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Supreme Court of the United States

OCTOBER TERM, 1954

No. ...764

EVEREST MELVIN HUPMAN, A/K/A
MELVIN E. HUPMAN,

Petitioner,

against

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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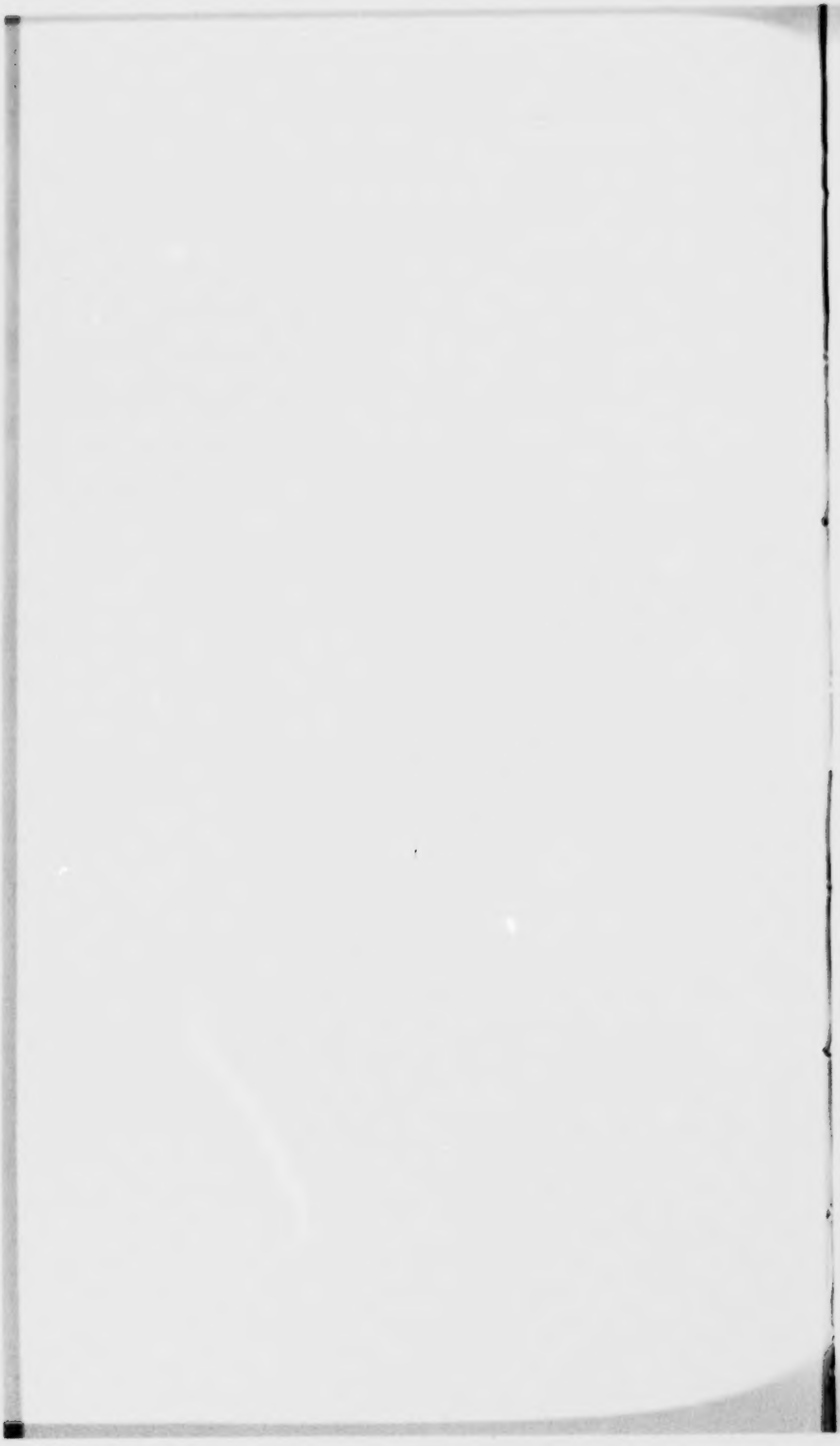

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No. ————

EVEREST MELVIN HUPMAN, a/k/a MELVIN E. HUPMAN,
Petitioner,

against

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Everest Melvin Hupman, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on the 7th day of February, 1955, affirming petitioner's judgment of conviction in the United States District Court for the Southern District of Ohio, Western Division.

Opinions Below

The opinion of the Court of Appeals (A. i) has not yet been reported. The opinion of Judge Martin, sitting as a district judge, denying the motion to dismiss the indictment and for other relief (R. 29) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on February 7, 1955 (A. xi). A petition for rehearing was denied on March 24, 1955. An order was signed by Mr. Justice Reed extending the time to file a petition for writ of certiorari until May 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

Questions Presented for Review

1. Whether Section 9(h) of the Labor-Management Relations Act of 1947, together with Section 1001 of Title 18, U. S. C., as applied herein to petitioner by the lower Court violates the First and Fifth Amendments to the Constitution, as well as Article I, Section 9, clause 3?

2. Whether in a criminal prosecution Section 9(h) of the Labor-Management Relations Act of 1950 on its face violates the First and Fifth Amendments to the Constitution, as well as Article I, Section 9, clause 3?

3. Whether in a prosecution under Section 1001 of Title 18, U. S. C., and Section 159(h) of Title 29, U. S. C., the Government must allege in the indictment and therefore prove upon trial as an essential element of the offense (a) that petitioner filed or caused to be filed the alleged false statement, and (b) that the statement was material to a matter within the jurisdiction of a department of the United States?

4. Whether the basis of the government's case, a non-Communist affidavit purporting to bear petitioner's signature, was admitted into evidence in violation of the Federal Business Records Act, as well as in violation of petitioner's rights under the Sixth Amendment?

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5. Whether in a prosecution under Section 1001 of Title 18, U. S. C., the government must charge and prove that a defendant made and filed the false statement with an intent to deceive or defraud the government, and if so, whether the judgment herein must be reversed?

6. Whether, when a federal criminal prosecution is based upon testimony of paid informers, a jury must be warned that the testimony is to be received with suspicion and acted upon with caution?

7. Whether the conviction violated the Fourth Amendment in that it rested upon evidence obtained through an illegal search and seizure?

8. Whether the petitioner was deprived of his right to counsel in violation of the Fifth and Sixth Amendments in that a paid informer, while acting as a secret agent for the government, obtained information from petitioner concerning defense plans and preparations during the pendency of the case and reported this information to the prosecution?

9. Whether the denial without hearing of petitioner's motion to dismiss the indictment on the ground that the grand jury was legally defective violated petitioner's statutory and constitutional right to indictment by a proper and impartial grand jury?

10. Whether the trial court's procedure in granting petitioner's requests to charge prior to summation and then reversing his ruling and so informing the jury during petitioner's summation contrary to Rule 30 of the Federal Rules of Criminal Procedure, constituted a denial of a fair trial and was so prejudicial as to warrant the granting of a new trial?

Statutes Involved

Title 18, U. S. C., Section 1001:

"Statements or entries generally.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

Title 29, U. S. C., Section 159(h):

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits."

Title 18, U. S. C., Federal Rules of Criminal Procedure, Rule 30:

"Instructions.

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any

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party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Title 28, U. S. C., Section 1732:

"Record made in regular course of business.

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

Title 28, U. S. C., Section 1733:

"Government records and papers; copies.

"(a) Books and records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction

or occurrence as a memorandum of which the same were made or kept.

"(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof."

Title 18, U. S. C., Federal Rules of Criminal Procedure, Rule 6:

"The grand jury.

"(a) Summoning grand juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

"(b) Objections to grand jury and to grand jurors.

"(1) Challenges. The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

"(2) Motion to dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment."

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Title 28, U. S. C., Section 1863:

"Exclusion or excuse from service.

"(a) A district judge for good cause may excuse or exclude from jury service any person called as a juror.

"(b) Any class or group of persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice.

"(c) No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color."

Title 28, U. S. C., Section 1864:

"Manner of drawing: jury commissioners and their compensation.

"The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

"The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

"Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive $5 per day for each day necessarily employed in the performance of his duties.

"The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

"This section shall not apply to the District of Columbia."

Summary Statement of the Matter Involved

A. The formal proceedings below.

Petitioner was born and raised in and about Dayton, Ohio, and has resided in that community all his life. He is a factory worker employed at his present position for more than fifteen years. He is now a resident of Clarksville, Ohio, where he and his wife run a small country store.

On November 21, 1952, an indictment was filed in the United States District Court for the Southern District of Ohio, Western Division, charging petitioner with violating Section 1001 of Title 18, U. S. C., to the effect that he had made false, fictitious and fraudulent statements in an "Affidavit of Non-Communist Union Officer" on December 15, 1949 (R. 18).

Petitioner was indicted on two counts. The first count charged that petitioner

> "* * * in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, willfully, and knowingly in an 'Affidavit of Non-Communist Union Officer' (Form NLRB-1081) make a false, fictitious and fraudulent statement and representation, to wit, that he was not a member of the Communist Party when in truth and fact the said Everest Melvin Hupman, a/k/a Melvin E. Hupman, then and there well knew such statement to be false, fictitious and fraudulent as he then and there well knew he was a member of the Communist Party."

Count Two of the indictment was identical, except that it charged that the alleged false statement and representation was

> "* * * that he was not affiliated with the Communist Party when in truth and fact the said Everest Melvin Hupman, a/k/a Melvin E. Hupman, then and there well knew such statement to be false, fictitious and fraudulent as he then and there well knew he was affiliated with the Communist Party."

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The indictment did not charge that the Affidavit of Non-Communist Union Officer was filed with the National Labor Relations Board, nor did it charge that the petitioner filed the affidavit or caused it to be filed, nor the date of any submission of a document to the agency. Furthermore, the indictment did not charge that the alleged false statements were material statements. Nor did it charge facts indicating that the alleged false statements were made and filed in a matter within the jurisdiction of a department of the United States.

There was no allegation in the indictment that petitioner was an officer of a trade union or that such a trade union was subject to the coverage of the National Labor Relations Act as amended. There was no charge in the indictment that the alleged false statements were made with an intent to deceive or defraud the Government, or to be used for the purpose of obtaining status or benefits from the agency of government.

On December 17, 1952, counsel for the petitioner filed a motion to dismiss the indictment and for other relief (R. 22). The trial court, in an opinion and order on January 29, 1953, denied petitioner's motion to dismiss (R. 29).

On August 3, 1953, petitioner was informed that the court had set aside the jury panel picked on July 28, 1953, on the ground that there might be some question as to its validity, and directed that a new jury list be composed (R. 57). At that time petitioner learned that the indicting grand jury was drawn from the same jury list which had been dismissed by the trial judge.

On August 5, 1953, petitioner filed a motion to dismiss the indictment, or, in the alternative, for a hearing on the motion, on the grounds that the grand jury was illegally constituted and without power to act in that the manner and method of its constitution violated the Fifth and Sixth Amendments to the United States Constitution, as well as Title 28 U. S. C., Sections 1861 through 1867, and Rules 6

and 7 of the Federal Rules of Criminal Procedure (R. 51, 52). Supporting affidavits were submitted with the motion and subsequent thereto an offer of proof was made (R. 55, 65, 79). Argument on the motion was scheduled for August 14, 1953. The court refused petitioner leave to argue the motion and further held that it would deny the motion without hearing (R. 99). Petitioner sought to file the offer of proof. The court refused to take the offer of proof at that time, but subsequently on September 8, 1953, granted leave to the petitioner to file it (R. 55, 65, 79).

The trial commenced on August 20, 1953, and continued through September 11, 1953. On September 11, 1953, after a day and a half of deliberation, the jury advised the court that it was unable to agree upon a verdict and thereupon the court discharged the jury from further consideration of the case.

On January 5, 1954 in argument before the trial court, all of the motions made prior to the first trial were renewed, including that relating to the grand jury. All of the motions were denied.*

On January 6, 1954, the second trial was begun. The trial continued through January 15, 1954, at which time the jury returned a verdict of guilty under both counts of the indictment. Four witnesses were called by the Government in the course of the trial: a legal examiner of the National Labor Relations Board (R. 126); one John Mitchell (R. 160), who testified with reference to his alleged relations with the Communist Party which terminated almost a year prior to the date in issue, and two paid informers, Dunham and Strunk (R. 266, 410). The defense called five character witnesses, being limited to that number by the presiding judge (R. 583).

Both at the end of petitioner's and the Government's case, petitioner moved for a judgment of acquittal, that

* The first trial was presided over by Judge Lester L. Cecil. Judge John H. Druffel presided at the retrial.

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the indictment be dismissed, and that the sole government exhibit be stricken from the record. These motions were in all respects denied.

On January 15, 1954, the court imposed sentence upon petitioner under both counts of the indictment: under Count One, the petitioner was sentenced to five years and a fine of $5,000; and under Count Two, to run concurrently, a sentence of five years was imposed (R. 628).

On February 7, 1955, the Court of Appeals for the Sixth Circuit entered a judgment affirming the petitioner's judgment of conviction. A petition for rehearing was denied by the lower court on March 24, 1955. An order was signed by Mr. Justice Reed extending the time to file a petition for writ of certiorari until May 2, 1955.

B. The record facts.

1. *Government Exhibit 1.*

The only exhibit introduced or offered by the prosecution was Government Exhibit 1 (R. 131, 658). As the lower court indicated without Government Exhibit 1 in evidence the case admittedly could not have been submitted to the jury. The exhibit purports to be an Affidavit of Non-Communist Union Officer bearing what is alleged to be the signature of the petitioner (R. 657). It was admitted into evidence over the opposition of petitioner during the testimony of Miss Virginia Bantel, an examiner employed by the N. L. R. B. in Cincinnati, Ohio (R. 131).

This exhibit was introduced without any foundation whatever. No evidence was introduced identifying the signature on the paper as being that of petitioner. No testimony of any attesting witness was taken, although the exhibit purported to contain the signature of a notary public. Although the notary public was known to the Government and present at the first trial, he was not called at the second trial (R. 133). No explanation for this failure

to call the notary public was offered by the prosecution. No evidence was adduced in any way connecting petitioner with the making or filing of the purported affidavit (Gov. Exh. 1). The only testimony in the record upon which the admission of the exhibit was founded was that of Miss Bantel to the effect that the paper came into her custody some time between January 5, 1950, and January 17, 1950. However, she testified she had no personal recollection of receiving or seeing Government Exhibit 1 but was relying solely on some notes (R. 143). These notes failed to indicate that she ever received any purported affidavit from petitioner. Similarly she testified that she had never notified petitioner of the receipt of any alleged affidavit, nor did she have knowledge of his filing or having caused the filing of the alleged affidavit, Government Exhibit 1 (R. 145-146). No testimony was offered as to where the prosecution found the paper during the preparation for trial, nor how Miss Bantel obtained possession of or saw the document prior to trial. There was no testimony that it was taken from any government file.

A stamp on the exhibit indicated that at one time it may have been received by the office of the N. L. R. B. in Washington, D. C. (R. 138-139). The paper does not contain a receipt stamp of the Cincinnati office of the N. L. R. B., although the testimony indicates that correspondence received by that office at the same time was normally marked with such a stamp (R. 138, 147).

On the basis of this state of the record petitioner strongly objected to the introduction of Government Exhibit 1 into evidence, as being wholly without legal precedent and authority, in clear violation of the decisions applying the Federal Business Records Act and the normal rules of hearsay evidence, thus totally departing from the accepted and usual course of judicial proceedings. The trial court overruled this objection upon the theory that the affidavit "was regular upon its face" (R. 129-130). The lower court affirmed this ruling as admissibility (A. iii-iv).

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2. *Evidence as to the essential elements of the offense required to be proven by the Government.*

(a) The Government relied solely upon Exhibit 1 to prove the essential ingredients of the offense, namely, that the affidavit was signed and sworn to by petitioner, that he was an officer of a trade union and that he filed it or caused to be filed with the Labor Board. The lower court conceded that "Had the record shown nothing more, we should we obliged to reverse. We do not agree with the Government's contention that because the affidavit appears regular upon its face and was found in the files of the Labor Board that that would sustain the jury's verdict * * *" (A. v-vi).

However, the lower court relied upon certain other testimony adduced at the trial by two paid informers, Dunham and Strunk, to sustain the utilization of Government Exhibit 1. Dunham testified as to a meeting which allegedly took place at petitioner's home in January or February of 1950, at which time an individual said to be the labor organizer of the Communist Party for the State of Ohio said to petitioner, "Since you signed this affidavit, the Taft-Hartley affidavit, read the Worker, the literature, don't pay any dues, but contribute, support the Party, don't attend any closed meetings" (R. 292-295, 369-372).

The second paid informer, Strunk, testified that at a meeting at petitioner's home on December 3, 1949, an individual said to be the State Chairman of the Communist Party of Ohio stated that "members who signed the Taft-Hartley affidavit should not attend meetings nor pay dues and should meet in an individual group which would be called the Taft-Hartley group" (R. 442-444, 476-480). Strunk further testified that petitioner was assigned to a "Taft-Hartley group." But by the witness' own testimony, this alleged Taft-Hartley group did not come into existence until the end of 1950, about a year after the purported signing and filing of Government Exhibit 1 (R. 448, 449, 531).

There was no evidence that either Strunk or Dunham saw Government Exhibit 1 signed, or in fact *ever* saw the document before the trial itself. Therefore, assuming the truth of their testimony there was no proof connecting petitioner with the exhibit which was essential for his conviction. Assuming *arguendo* petitioner signed an affidavit, there was no evidence whatever that it was utilized or filed with the National Labor Relations Board, or in fact when and where it may have been signed. No inference in support of Government Exhibit 1 could be drawn from the two uncorroborated conversations testified to by the two informers. Yet the lower court concluded that on the basis of this testimony an inference might be drawn that petitioner signed and filed or caused to be filed the particular affidavit involved as Government Exhibit 1.

No direct evidence was adduced that Government Exhibit 1 was ever actually filed with the Cincinnati office of the N. L. R. B. Prosecution witness Bantel testified that she had no personal or independent recollection of the receipt of the alleged affidavit (R. 143). She testified that she not only had no record or recollection of petitioner sending an affidavit, but further she had no independent recollection as to who sent it to her (R. 143). She testified that she never had any correspondence with petitioner with respect to any alleged affidavit, and that she had never notified the petitioner of the receipt of any alleged affidavit (R. 145-146). Thus there is no evidence in the record that petitioner himself filed by mail or otherwise or ever instructed, caused or requested anyone else to file the alleged affidavit with the N. L. R. B. in Cincinnati or Washington, nor is there any evidence that the petitioner knew that Government Exhibit 1 was in fact filed * (R. 158-160).

(b) The record contains no evidence that the alleged false statement was a material statement within the juris-

* The Government failed to produce the official files of the N. L. R. B. They were finally subpoenaed by petitioner. An examination revealed nothing to connect petitioner with the affidavit (R. 136-138).

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diction of a department of the United States. There was no evidence adduced that petitioner was an officer of a trade union seeking compliance with the N. L. R. B., nor was there any evidence that the alleged false statement was made by an officer of a union representing employees engaged in or affecting interstate commerce within the meaning of the National Labor Relations Act as amended.

(c) The record contains no evidence that petitioner intended to deceive or defraud the agency or that he intended to obtain any benefits or use the processes of the N. L. R. B. in behalf of himself or any union. Likewise there was no evidence of an intent willfully to make a false statement in an affidavit which was to be filed with the agency.

(d) An Affidavit of Non-Communist Union Officer requires an affiant to swear that he is not a member of or affiliated with the Communist Party at the time of swearing. The affidavit does not require an oath as to prior membership or affiliation, or a promise as to future conduct. It is simply a statement of a contemporaneous condition. The statute authorizing the oath contemplates that individuals will renounce the proscribed affiliations at the time of swearing.

Thus, the decisive factual question presented by the allegation of false swearing was whether petitioner was a member of or affiliated with the Communist Party on December 15, 1949, the day the affidavit was allegedly signed.

Membership in or affiliation with the Communist Party must be shown by direct proof of overt acts which, if believed, lead inevitably to the inference of membership or affiliation at the time in issue. These overt acts, as Chief Justice Vinson pointed out in *American Communications Association* v. *Douds*, 339 U. S. 382, are such as the act of joining the Communist Party.*

* Membership in the Communist Party, as testified to by Government witnesses in the trial below, requires an affirmative act of join-

Applying these standards, there is no direct evidence in the record as to actual membership or affiliation of petitioner with the Communist Party at the crucial period. The prosecution rested its case solely upon certain testimony, concerning activities of petitioner relating to periods other than the time in issue. In the absence of such direct testimony, the prosecution sought to sustain its burden through the establishment of a pattern of circumstantial evidence based upon certain presumptions.

The Government's case revolved around two alleged occurrences: a discussion purporting to have taken place in January or February, 1950 (R. 292-295, 369-372), and a discussion purporting to have taken place on December 3, 1949 (R. 442-444, 476-480). This evidence was developed through the testimony of two witnesses who confessed on the stand to having been paid informers for the prosecution (R. 266-267, 319-338, 411-412, 467-476, 488-491).

Three witnesses testified as to petitioner's alleged membership in or affiliation with the Communist Party. The first witness, John Mitchell testified that he severed all relations with the Communist Party in or about February, 1949 (R. 226-227), and therefore could not give evidence relevant to the period at issue in the present proceedings. The other two witnesses were the paid informers, Dunham and Strunk.*

The testimony as to the January or February, 1950, gathering was that the informer Dunham was present at an afternoon discussion at which one Joe Brant, reportedly a representative of the Communist Party of Ohio, advised petitioner that since he had signed a non-Communist affidavit he should not pay any dues to the Communist Party

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ing the Communist Party each year or "registering" each year to obtain and maintain the relationship (R. 190, 422-424), payment of dues (R. 222, 366, 563), and regular attendance at closed meetings (R. 385, 430).

* Strunk and Dunham testified that their pay was based on the nature and frequency of information given to the investigative authori-

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and should not attend any closed meetings of the Communist Party. The testimony was that Brant suggested that petitioner read Communist literature. According to the witness, petitioner agreed with this advice (R. 295).* The witness further testified that petitioner attended some kind of gathering that same evening and contributed $75 to a fund known as the Rothenberg fund (R. 295-299). He did not know who Rothenberg was or any details of the fund, but characterized it as "Communistic" (R. 394-395). The witness did not testify that at this gathering in January or February, 1950, petitioner paid any dues to the Communist Party, nor that he signed any application or reapplication for membership in the Communist Party.† Nor did Dunham testify to any registration as a member of the Communist Party by petitioner at any time within a year of the alleged signing of the affidavit.

The other episode upon which the prosecution rested its case was in the testimony of the informer Strunk. This witness testified that on December 3, 1949, a representative of the Communist Party of Ohio said that five individuals who were going to sign non-Communist affidavits should not attend meetings of or pay dues to the Communist Party (R. 442-444).

There is no direct evidence as to alleged Communist membership or affiliation during the period of time legally relevant to the offense charged, namely, false swearing as

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ties. In addition, they were reimbursed for expenses incurred, most of said expenses not being verified by voucher or receipts. Both admitted to receiving monthly payments from the United States Government even after they stopped "informing" and particularly since the termination of the first trial in September, 1953 (R. 327-338, 412, 467-476, 488-491). After March, 1949, both informers claimed to belong to the same local Communist Party organization, yet neither corroborated the testimony of the other as to alleged Communist Party meetings or activities after that time.

* Dunham and Strunk did not testify to any payment of dues by petitioner at any time in 1949 or 1950.

† See footnote on page 15.

to membership in or affiliation with the Communist Party on December 15, 1949.

The prosecution introduced considerable evidence over defense objection concerning petitioner's alleged associations with the Communist Party considerably prior to the signing of the affidavit. This evidence was legally irrelevant to the issues of the case and highly prejudicial. It included testimony concerning a gathering with an individual known as "Mother" Bloor at which petitioner was said to have donated money for the legal defense costs of Communists then on trial (R. 285-288, 383-386, 437-442, 539-549), as well as testimony concerning attendance at various Communist meetings. Although this evidence was improperly admitted to the prejudice of petitioner, the contrast with the evidence adduced for the legally relevant period is striking. For the relevant period of time, on or about December 15, 1949, there is no evidence concerning any act indicative of membership in the Communist Party. There is no evidence concerning any registration with the Communist Party. There is no evidence concerning any dues payment to the Communist Party.*

Finally, some evidence was introduced concerning alleged Communist activity at a time considerably *after* the relevant period (R. 301-309, 450-460). At the first trial of petitioner, the presiding judge properly excluded such irrelevant and prejudicial testimony.

Thus, as of December 15, 1949, and for a considerable period of time before that date and after, there was no direct evidence in the record of any overt acts from which the jury could have inferred that petitioner was in fact a member of or affiliated with the Communist Party on the crucial day, December 15, 1949.

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* The conversations of December 3, 1949, and January or February, 1950, related to a termination of a relationship which was said to have existed prior to December 15, 1949.

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While the indictment charged petitioner with being an affiliate of the Communist Party, no evidence was adduced in support of this contention. A Government witness testified that the only relationship with the Communist Party is one of membership (R. 223). There was testimony concerning membership cards and membership lists. Application forms provided only for the status of membership with certain associated and clearly defined rights, privileges and duties. There is no evidence in the record that the organization permitted such a relationship of affiliation or that petitioner was aware of such a status.

At the conclusion of the prosecution's case, petitioner moved for a directed verdict of acquittal on the ground, *inter alia*, that the Government had failed to sustain its burden of showing beyond a reasonable doubt that petitioner was in fact a member of the Communist Party or affiliated therewith on December 15, 1949 (R. 575, 629). The trial court denied this motion and petitioner adduced the testimony of the maximum number of character witnesses permitted by the court (R. 575, 583-593). These witnesses, Jones, Partlow, Clark, Hatton and Jackson, all testified to petitioner's good character and reputation for truth and honesty.

3. *The illegal search and seizure.*

A paid agent of the Government admitted that he had entered petitioner's home under false pretenses, had rifled through his possessions and personal effects, had taken notes based upon this search and had turned these notes over to the Federal Bureau of Investigation (R. 342). Petitioner thereupon promptly demanded the production of these notes (R. 343-347) which motion was denied (R. 407-409). Petitioner moved to strike the illegally obtained evidence (R. 637). This motion was also denied.

4. *The demand for the production of certain vouchers, records of payments and written receipts in the possession of the Government.*

The two principal witnesses for the prosecution admitted on the stand to being paid informers. They testified that they were paid according to the quantity of information turned over by them. Although they testified at first that they were so paid, they attempted to retreat from this admission (R. 266-267, 319-338, 411-412, 467-476, 488-491). Counsel asked for the production of the receipts, vouchers and records of payment by the Federal Bureau of Investigation or the Department of Justice or any federal agency to the two witnesses. This demand for production was made in open court upon the United States Attorney and pursuant to a subpoena served upon the Special Assistant to the United States Attorney (R. 572). The Government refused to obey the subpoena and declined to produce the records requested. The trial court sustained this refusal (R. 573). When counsel for petitioner sought to serve additional subpoenas upon the Attorney General or other government officials, he was precluded from doing so by the court (R. 578-582).

Particularly in the examination of the two paid informers, Strunk and Dunham, many internal inconsistencies were revealed. Their testimony was in conflict with that given in the first trial in several significant aspects. These witnesses testified that they had made contemporaneous written reports to the Federal Bureau of Investigation at or about the time of their observations (R. 267, 342, 391-393, 412, 566). The witness Strunk testified that he had custody of purported annual membership lists of the Communist Party, and on various occasions he destroyed these membership lists without making them available to the Government. In other instances, he testified, he made notes from these lists and transmitted them to the investigative agency (R. 563-565). In light of this testimony, petitioner

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sought to no avail the production of these notes, reports and lists, as well as records of payments. The Assistant United States Attorney, in conflict with the witnesses' testimony of the submission of these reports, stated he did not know of their existence (R. 581).

5. *The deprivation of right to counsel.*

A secret agent of the Government, the informer Dunham, confessed in the course of cross-examination that after the indictment had been obtained, while still masquerading as a friend of petitioner, he attempted to obtain information from petitioner concerning preparations for trial, including information as to what the attorneys were doing to prepare for trial. He testified that he heard information concerning petitioner's defense preparations and that he reported this information to the Federal Bureau of Investigation and was paid for it (R. 372-374). Petitioner unsuccessfully moved to dismiss the indictment because of this illegal and improper interference with the right to counsel guaranteed by the Fifth and Sixth Amendments.*

6. *The record facts relating to the challenge to the grand jury.*

The facts as supported by the affidavits and offer of proof reveal irregularities and improprieties in the method and manner of selection of the grand jury which reach its very legal existence and power to act (R. 51-90).

The most fundamental defect in the indicting grand jury related to the manner, method and means of selecting names for the jury list. The record reveals a total delegation of the selection of the grand jury to persons other than the jury commissioner, the clerk or his deputy. From

* Petitioner also sought a hearing and examination on the nature and scope of the information and circumstances under which it was obtained, to determine thereby whether in light of these facts the court should, nevertheless, dismiss the indictment or declare a mistrial. This was summarily denied (R. 574).

interviews with the jury officials it was revealed that it was the custom and practice to delegate the selection of jurors to postmasters, local political officials, and other unauthorized persons whose status in society, name or address were often unknown to the jury officials.

In many instances these persons in turn delegated the selection of jurors to third parties. The federal jury officials would receive lists of names from sources unknown, and without any selection, judgment, appraisal or investigation of any sort place them in the jury box. Nor did the jury officials investigate, appraise or evaluate the persons on the jury list at any time thereafter. The persons so unlawfully delegated with the power of selecting jurors were not given any criteria or standards. They were not informed as to the number or type of jurors desired, nor of the minimum federal standards in the selection of jurors.

The persons unlawfully delegated did not submit a fair or representative cross-section of the community but, in fact, consciously, intentionally and systematically chose individuals so as to exclude or permit a mere token representation of Negroes, manual workers and trade unionists. The choice was limited to those persons who were intimately associated by reason of political, social or economic ties, to the persons who submitted the names to the clerk. The names included in the jury list from Clark and Montgomery counties were not only unknown to the federal jury officials, but, further, these officials did not know how these names were obtained or placed in the jury box (R. 60-61, 63-64, 79, 83, 89).*

* The court records revealed no docket entry or order of the court calling, swearing and impaneling the indicting grand jury. The court records reveal no *venire facias*. See Title 28, U. S. C., Section 457, and related statutes. An examination disclosed that there were no *venire facias* in the office of the clerk since January 1, 1950 (the period covered by the investigation). There was no complete list of the various panels of grand and petit juries since that time. There was no record when any of the names were placed in the jury box, the source of the names, the names withdrawn from the jury box and

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In addition, a portion of the names on the jury list came from sources precluded by federal law from submitting such names. Names were recommended by individuals associated with the United States Attorney's office. In obtaining these names and placing them on the jury list, the only function performed by the federal jury officials was the mechanical placement of the slip into the box and its ultimate drawing. Other than that, the federal jury officials did not perform any of their required duties.

A natural concomitant of such a method of selection was the intentional and systematic exclusion of substantial groups of the population, manual workers, trade unionists and Negroes. As a result, the jury list and indicting grand jury did not constitute a fair representative cross-section of the community but were consciously and intentionally weighted with professionals, members of the managerial class and non-manual employees.*

The deficiencies in the jury list from which the indicting grand jury was drawn were recognized at least in part by Judge Cecil when he ordered the composition of a new list for the petit jury, after objections by petitioner. Yet he refused to set aside the indictment found by a grand jury drawn from the discarded list.

Reasons for Granting the Writ

1. This petition brings to the Court for review for the first time a criminal proceeding seeking to enforce the non-Communist oath requirement for officers of labor unions

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when said withdrawals took place. Similarly, there was no record as to who drew the names from the box or any means of determining the number of names in the jury box at any time. Similarly, the clerk's office was devoid of any records, questionnaires or interviews of any prospective jurors to determine competency or qualification.

* For the full data and analysis of the grand jury, jury lists and panels and the occupational makeup of the eight counties involved, see

contained in the Labor-Management Relations Act. The case contains grave constitutional and statutory problems as foreseen in the divided opinions of the Court in *American Communications Association* v. *Douds*, 339 U. S. 382. Numerous other cases involving the non-Communist oath are presently pending in the lower courts. This Court should in the public interest review the questions presented in this precedent-setting proceeding.

Moreover, the decision of the lower court is in conflict with decisions of other courts of appeals on matters of great importance to the administration of federal justice. The decision of the lower court is furthermore in conflict with applicable decisions of this Court. Finally, the decision of the lower court has sanctioned such a departure from the accepted and usual course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

2. In *Douds*, this Court in the majority opinion of Mr. Chief Justice Vinson, carefully pointed out that Section 9(h) of the Labor-Management Relations Act clearly impinges upon the areas of liberty protected by the First Amendment to the Constitution. The divided Court

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R. 67-75, 88, and Exhibits A and B of affidavit of Marshall Perlin dated August 8, 1953.

A substantial number of jurors were either public officials or immediate relatives of public officials (R. 76, 78, 84-85).

A substantial portion of the jury list was made up of retired, professional jurors. Some of the jurors included in the indicting grand jury panel were also included in the first petit jury list for the trial in Dayton, drawn from the same list. A partial examination of the list reveals a substantial percentage of the jury list had served on petit and grand juries on several occasions within a two or three-year period (R. 77-78, 85-86).

The errors arising from the improper selection are further compounded by the fact that a substantial number of the jurors were not competent to serve as jurors under Ohio law, and the manner of selecting jurors by the county jury commissioners, when unlawfully delegated to do so, was contrary to the procedure set forth in the Ohio State Code (R. 62-63).

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in sustaining the statute against an attack upon its face, left open for review in a subsequent proceeding the many difficult constitutional problems involved in an application of this statute to a particular individual in a criminal proceeding. This petition now brings these problems, foreshadowed in *Douds*, squarely before the Court.

Section 9(h) was sustained on its face by the majority of the Court on the basis that the danger to interstate commerce resulting from the calling of political strikes was greater than the injury to First Amendment rights inflicted by the Section 9(h) oath. The Chief Justice pointed out that Section 9(h), directed solely against union officers, was constitutional only to the degree that it affected the "occupancy of a position of great power over the economy of the country." *American Communications Association* v. *Douds*, at page 404. The Chief Justice further pointed out that "it becomes highly relevant whether the person who was asked whether he believes in overthrow of the Government by force is a general with 500,000 men at his command or a village constable" (at p. 409). Thus the constitutionality of Section 9(h) rested upon the assumption of the Court that it could be sustained only in circumstances involving a real and substantial threat to the national economy and the free flow of interstate commerce, and certainly only where there was an effect upon interstate commerce.

Surely, where the Government seeks to invoke the power of the criminal law to enforce a sanction admittedly impinging upon the area of First Amendment liberty, it will be held to at least the same standards as those applied to sustain the civil and administrative aspects of the statute wherein a hearing is held and determination made as to the impact, if any, of the particular case upon interstate commerce. Thus at a minimum, petitioner was entitled to adduce facts before the trial court tending to show that the situation was such as to require a ruling that the statute could not be constitutionally applied to him.

The petitioner urged that under the *Douds* decision it was incumbent upon the Government to charge in the indictment and prove at the trial that petitioner himself fell within the category delineated by the Chief Justice. Furthermore, petitioner offered to prove in support of his motion to dismiss the indictment that the facts were such as to indicate that Section 9(h) as upheld in *American Communications Association* v. *Douds* could not constitutionally serve as a foundation for a criminal indictment against him (R. 24). It is, of course, always open to a defendant to adduce evidence to show that a particular statute may not be constitutionally applied against him. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543; *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398; *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415.

The blanket refusal of the lower court to permit the petitioner to present evidence to show that under the ruling of the Chief Justice in *Douds* the statute could not be constitutionally applied herein was in open conflict with the decision of this Court. If the decision of the lower court is permitted to stand without review, then the constitutional rationale carefully delineated by the Chief Justice becomes only a shadow distinction without substance.

3. Under the impact of the First Amendment, this Court further limited the applicability of the statute to those situations where the truth or falsity of the political oath required can be shown by "objective facts which may be proven directly." To sustain the statute against the attack of unconstitutional vagueness in the area of the First Amendment, compare *Winters* v. *New York*, 333 U. S. 507; *Musser* v. *Utah*, 333 U. S. 95, the majority opinion of the Court pointed out that in proving that one swore falsely that he is not a Communist, direct evidence of overt acts, objective facts, such as "the act of joining the party is crucial" (at pp. 410-411). In short, the majority of this Court sustained the constitutionality of the 9(h)

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provision against a charge of unconstitutional vagueness by emphasizing sharply that the fact of membership or affiliation must be shown by direct proof of certain overt acts.

Both the trial court and the Court of Appeals totally ignored this constitutional mandate. The jury was not instructed that the alleged falsity of the political foreswearing must be proven by direct proof of certain specific overt acts, such as the act of joining the Communist Party. In this case the jury was instructed directly to the contrary.*

This question concerning the applicability of a statute which on its face raised serious constitutional problems for the Court, has grave and sweeping importance to the present administration of federal criminal justice. Many cases are now pending in the inferior federal courts involving the alleged fact of Communist Party membership. The Court of Appeals for the Second Circuit has laid down a rule of law controlling this situation, *United States* v. *Remington*, 191 F. 2d 246, cert. denied 343 U. S. 907, which is in direct conflict with the decision of the trial court and Court of Appeals herein.

In interpreting this Court's opinion in *Douds*, the Court of Appeals for the Second Circuit held that a charge to the jury on what constitutes membership in the Communist

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* The lower court instructed the jury as to what constituted membership in the Communist Party in the following way:

> "Thus, in considering whether or not the defendant was a member of the Communist Party, you may consider circumstantial evidence, as well as direct.
>
> "You may consider whether or not he attended Communist Party meetings; whether or not he paid money to the Communist Party; whether or not he took instruction from Communist Party leaders or officers; whether or not he took part in the dissemination or distribution of Communist literature; whether or not he engaged in other conduct consistent with membership in the Communist Party, and all other evidence, either direct or circumstantial, which may bear upon the Communist Party" (R. 615).

Party in a prosecution for false swearing must single out for the jury those overt acts which would furnish a rational basis for inferring that the accused believed he was, and was in fact, a member of the Communist Party. *United States* v. *Remington, supra.**

The charge of the trial judge below (R. 615) falls far short of the requirements established in *Douds* and *Remington, supra.* As far as the charge below is concerned, the jury might well have found that petitioner was a member of the Communist Party and knew he was merely by relying on any one of the many facts which the Judge told them they could "consider." Thus the jury might have rested its conclusion merely upon finding that petitioner "took part in the dissemination or distribution of Communist literature" (R. 615).

Moreover, the trial court charged that the petitioner could be found guilty merely because he "engaged in other conduct consistent with membership in the Communist Party." This could have included such conduct as voting at the polls, being a trade union member, being a factory worker, being a union officer, or, for that matter, having any attributes whatsoever which might coincide with those of a member of the Communist Party.†

This Court in upholding the constitutionality of Section 9(h) stated that it did not outlaw or make illegal

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* The charge in *Remington* was actually more specific and direct than the charge of the lower court in the present proceeding. Nevertheless, the Court of Appeals for the Second Circuit found the charge too vague and indefinite and consequently prejudicial to the defendant. The court pointed out that in a prosecution for false swearing the judge must single out for the jury those overt acts which would constitute the basis for a determination of membership in the Communist Party. The court relied heavily upon Chief Justice Vinson's opinion in *American Communications Association* v. *Douds.*

† Indeed, the last phrase of this portion of the court's charge, that the jury may consider "all other evidence, either direct or circumstantial, which may bear upon the Communist Party", is totally devoid of meaning as a guide to a determination of membership.

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membership in the Communist Party, nor indeed did it proscribe support or attachment to that organization. Rather the Court held that an officer of a union using the processes of the National Labor Relations Board must execute an affidavit to the effect that he is not "now" a member or affiliate of the Communist Party. Further, to found a criminal prosecution against a union officer the government must produce direct proof of overt acts which would establish the formal relationship of membership in or affiliation with the Communist Party, holding that such a status is peculiarly susceptible to proof through overt acts. Absent such direct proof and specific standards, there would be not only an absence of due process, but a union official could be convicted on a basis totally precluded by this Court in *Douds*.

The failure to adhere strictly to the requisite criteria of proof of the relationship at issue led the prosecution and the lower courts herein far afield into an area never contemplated by the legislature or this Court. The prosecution during summation adverted to a "Communist conspiracy" to overthrow the United States Government. Petitioner's counsel objected to it as prejudicial and not at all germane to this case of whether or not there was a false swearing. The trial court in overruling the objection stated in the jury's presence that the policies of the Communist Party were a question for the jury (R. 599-601).*

The rationale of the lower court in sustaining the conviction only serves to accentuate the error of the trial court. In its opinion, recognizing the absence of proof of membership or affiliation on or about the crucial date, December 15, 1949, it relied on two conversations. This testimony did not constitute direct proof of overt acts, but rather indicated, if true, a shedding of *past* membership or

* Petitioner requested the trial court to charge "* * * that the Communist Party, its attitudes, policies, or activities are not at issue or on trial in this case" (R. 626). The court refused to do so.

affiliation. From this the lower court deduced the petitioner was "maintaining connection with and giving support to the party" (A. viii).

Thus, the meaningful term membership is abandoned and for it is substituted "maintaining connection with". Surely, such "criteria" clearly violate the unequivocal standards and proof demanded by the Court in *Douds.**

Chief Justice Vinson in upholding the constitutionality of Section 9(h) stated that no honest untainted swearing could constitute grounds for prosecution under Section 1001 (formerly Section 35A) of Title 18 (at p. 413). Further that the terms "membership" and "affiliation" were sufficiently definite to put the union officer on notice as to their meaning, and it is their meaning to the affiant which must be shown to be in conflict with the oath. Not only was this element absent from the court's charge, but further, the jury was given no basis upon which to determine the fact. Each juror was granted the license to make his own determination of the meaning of Communist Party membership, which today in our political life suffers from the most variegated and loose conceptions.

The implications of this question are very profound in contemporary America. If the approach of the trial court as approved by the Court of Appeals is sanctioned, the concept of guilt by association will prevail in the federal courts and the attempt at constitutional limitation projected by this Court in *Douds* will have been vitiated.

4. The record evidence upon which petitioner's judgment of conviction rests reveals that petitioner has been convicted of the exercise of rights solely within the protected orbit of the First Amendment. The acts for which the Government seeks to imprison petitioner consist solely of al-

* Further Petitioner was not charged with a false statement as to "support" of an organization with certain programs and policies (R. 18-19, see Govt. Exh. 1, R. 658).

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leged attendance at meetings, discussions on political, social and economic matters, as well as other activities of a normal, peaceful political character. There is no evidence in this record of any illegal conduct or activity or of any illegal advocacy or incitement. More than this, there is no evidence in the record to indicate that the activities of petitioner have created or threaten to create any serious danger of a substantive evil within congressional power. This Court has held that a statute which can be construed to sustain a judgment of conviction based upon such facts plainly violates the First Amendment. *Saia* v. *New York*, 334 U. S. 558, 562; *Thomas* v. *Collins*, 323 U. S. 516, 530; *Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Schneider* v. *State*, 308 U. S. 147, 161; *Winters* v. *New York*, 333 U. S. 507; *Jones* v. *Opelika*, 316 U. S. 584, 618; *DeJonge* v. *Oregon*, 299 U. S. 353; *Stromberg* v. *California*, 283 U. S. 359; *Burstyn* v. *Wilson*, 343 U. S. 495.

As set forth in Paragraphs 3 and 5 herein the trial court's instruction as to membership and affiliation was so vague and ill defined as to deny the jury the requisite standards by which to determine the presence of direct proof of overt acts of membership and affiliation. This error was further compounded by permitting the jury to consider the policies of the Communist Party. As a result, irrelevant evidence may have served to convict petitioner. For example, testimony to the effect that petitioner contributed money to the legal defense of Communists (R. 285-288, 383-386, 437-442, 539-549), read certain literature, disseminated literature or discussed political issues—not indicia of Communist Party membership, but activities protected by the First Amendment—could have in the context of the trial served as the basis for the conviction.

5. The instructions of the trial judge as sustained by the lower court in respect to the question of affiliation with the Communist Party violated the requirements of the

First and Fifth Amendments to the Constitution.* The charge given was utterly meaningless and left the jury without any standards whatsoever upon which to base a finding of guilt or innocence. As this Court pointed out in *Douds*, the term "affiliated" is at best of "dubious scope." *A.C.A.* v. *Douds*, *supra*, p. 420. See also *Bridges* v. *Wixon*, 326 U. S. 135. Thus, the word "affiliated" as used in the statute and as construed and applied to the petitioner herein is so vague, uncertain and indefinite as to set no intelligible standard of proscribed conduct for the jury. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *United States* v. *Cardiff*, 344 U. S. 174; *United States* v. *Hautau*, 43 F. Supp. 507 (D. C. N. J.); *Bridges* v. *Wixon*, *supra*, at 143-147.

Judge Martin in hearing the pretrial motion to dismiss alluded to the difficulty of defining "affiliation" and the need for proof of overt action, stating:

> "My concept of the word 'affiliate', why I am doing this talking, is that it is a word variable quite a bit in its meaning. To one person 'affiliated' would mean one thing; to another person it would mean much less. And then, of course, guilt of association, we would not want to indulge in construction of a statute that would find a man guilty of association. *It would have to be by some overt action.*"

The trial court's charge failed to meet the problem posed by Judge Martin. In the absence of proof that there was a status of affiliation with the Communist Party, and that petitioner knew of such status, the constitutional standards of notice and proof of overt acts set forth in *Douds* were not met.

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* The trial court charged as follows, in respect to affiliation:

> "Affiliation, as used in subsection (h) of Section 159, Title 29 of the United States Code, means something less than membership but more than sympathy. Affiliation with the Communist Party may be proved by either circumstantial or direct evidence or both" (R. 616).

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6. The opinion of the Chief Justice in *Douds* saves the statute from violating the constitutional prohibition against bills of attainder, by narrowly restricting its prohibition to the state of membership or affiliation of a union officer *solely at the time of swearing*. Having placed this gloss upon the statute, the Chief Justice emphasized that the requirement of the affidavit does not reach the past conduct of the foreswearing union officer and held:

> "This distinction is emphasized by the fact that members of those groups identified in Section 9(h) are free to serve as union officers if at any time they renounce the allegiance which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in Section 9(h), is not a bar to resumption of the position."

The implications of *Douds* in this respect are clear. If a union officer were to be punished primarily for conduct which pre-dated the signing of the affidavit, the statute as applied would fall as a bill of attainder. The trial court and the court below wholly ignored this careful warning of the Chief Justice.

The strictly limited nature of the affidavit and the consequent difficulties in a prosecution based upon a filing of such an affidavit have been sharply underscored by testimony of high officials of the Department of Justice responsible for the enforcement of this law.*

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* See testimony of Assistant Attorney General McInerney, then head of the Criminal Division of the Department of Justice, 82d Cong., 1st Sess., Senate Committee on Appropriations, Hearings, *Department of State, Justice, Commerce and the Judiciary, Appropriations for 1952*, Part 1, page 163.

Andrew F. Oehmann, assistant to Mr. McInerney, declared:

> "* * * it is virtually impossible to develop cases for successful prosecution under the Section as now drawn. * * * a prosecution can be undertaken with some hope of obtaining a conviction only when it is possible to prove that on the very day the affidavit was executed, the affiant was a member of the Communist Party,

As far as the jury was concerned, petitioner was tried and convicted *primarily* for his alleged past conduct. No instruction was given to the jury either in the words or spirit of the limitation in *Douds*.

The court's charge as to circumstantial evidence and membership in the Communist Party (R. 614-615) related the question of proof of membership to any time and not necessarily to the time in issue in the case, December 15, 1949.*

The lower court, as did the trial court, seeks to sustain the conviction on the basis of past conduct and irrelevant subsequent conduct in that to do otherwise would impose an overwhelming burden on the prosecution, one that it cannot be expected to meet. Yet the chief law enforcement officials acknowledged this inherent difficulty in Section 9(h) prosecutions. It is not for the courts to legislate anew to meet such difficulties.

The statute as applied to this petitioner, if the decision of the lower court is sustained, clearly violates the constitutional prohibition against bills of attainder. The seriousness of this question both in respect to the fundamental constitutional rights of this petitioner as well as the other many pending prosecutions under the statute requires review by this Court.

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or affiliated therewith, or was engaged in other proscribed conduct or mental processes." 82d Cong., 2d Sess., Senate Committee on Labor and Public Welfare, Hearings, *Communist Domination of Unions and National Security*, page 54.

See also testimony of Warren Olney, III, present Assistant Attorney General in charge of the Criminal Division, 83d Cong., 1st Sess., Senate Committee on Labor and Public Welfare, Hearings, *Taft-Hartley Act Revisions*, p. 940.

* While there was no testimony of registration, joining the party or paying of dues in 1949 and none in 1950 at least until November of that year, a substantial portion of the government's case related to purported membership in 1951 and 1952. While there was no testimony in the record whatsoever, the prosecutor in summation stated: "* * * even today, ladies and gentlemen, Melvin Hupman was a member of the Communist Party" (R. 605).

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7. The opinion of the lower court concedes that the conviction of petitioner could not have been sustained in the absence of the admission into evidence of Government Exhibit 1, the Affidavit of non-Communist Union Officer. The lower court held that the exhibit was properly admitted into evidence because "it was made upon a printed form provided by the Labor Board and appears to be regular upon its face" even though no other foundation whatsoever was laid for the admission of the paper (A. iv). Yet it is the very question of "admissibility," not discussed by the lower court, which must be determined in considering the conviction below.

The prosecution at the trial never attempted to connect petitioner with the document at issue, Government Exhibit 1. This absence of proof was admitted when the government in its appeal brief stated:

> "No such attempts were made because appellee takes the position that the instrument speaks for itself and is admissible in this case if there is uncontradicted direct proof that it was actually on file with the National Labor Relations Board as required by Section 159(h) of the Act."

This ruling of the lower court raises the most serious questions concerning the administration of the Federal Business Records Act as applied to Government records, as well as the impact of the Sixth Amendment upon the construction of the statute by the lower court. Moreover, this ruling is directly in conflict with the recent decision of the Court of Appeals for the Fifth Circuit in *Matthews v. United States*, 217 F. 2d 409 (C. A. 5, December 9, 1954).

As the Court of Appeals in *Matthews* reads the governing law, the Federal Business Records Act, either generally or as applied to Government records in 28 U. S. C. 1733, does not permit the admissibility of documents such as Government Exhibit 1 merely because they are "regular on their face" since such papers are not documents

made out by *Government officials* in the *regular course of Government business.**

After a careful analysis of the statute and the controlling precedents, the Court of Appeals for the Fifth Circuit concludes that neither the Federal Business Records Act nor the common law shop book rule sanctions such a gross violation of the long established principles of the hearsay rule. In coming to this conclusion the court relies heavily upon this Court in *Palmer* v. *Hoffman*, 318 U. S. 109.

Moreover, the opinion in *Matthews* points out that the weakening of the hearsay rule as sanctioned by the lower court in this proceeding raises serious constitutional problems involving the right of accused persons guaranteed under the Sixth Amendment to confrontation of witnesses.†

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* To be admissible, the document "must be within that class of official records or documents which are excepted from the hearsay rule", *U. S.* v. *Smart*, 87 F. 2d 1 (C. A. 5), i.e., "a statement made by a public functionary in the course of official duty", *Seals* v. *U. S.*, 70 F. 2d 519 (C. A. 5); "a contemporaneous entry made in the line of duty by a public functionary", *U. S.* v. *Timmons*, 68 F. 2d 654 (C. A. 5). See also *Third National Bank and Trust Co.* v. *United States*, 53 F. 2d 599 (C. A. 6); *Hartzog* v. *United States*, 217 F. 2d 706 (C. A. 4).

† Thus, the court in *Matthews* points out the dangers involved were Section 1733 to be construed as the lower court herein construes it:

> "But, if Congress attempted to create new exceptions to the hearsay rule which were contrary to the sound principles underlying that rule, the very principles which must have been contemplated by the drafters of the Sixth Amendment, could we properly say that these were 'legitimately created' or that they did not violate the Constitutional right of confrontation in criminal cases? We think not. While the Sixth Amendment does not prevent creation of new exceptions to the hearsay rule based upon real necessity and adequate guarantees of trustworthiness, it does embody those requirements as essential to all exceptions to the rule, present or future. To hold otherwise would be to hold that Congress could abolish the right of confrontation by making unlimited exceptions to the hearsay rule."

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To permit a document to found a conviction because it is "regular on its face," where the petitioner's signature has not been identified, and where there is no evidence that the petitioner filed it or caused it to be filed, destroys every meaningful concept of the rules of evidence in a criminal proceeding. It destroys the concept of presumption of innocence. An innocent party would then be forced to carry the burden of proof in the face of a charge that could be so easily contrived by persons unknown.

The decision of the lower court permitting the admissibility of Goverment Exhibit 1 upon which the entire prosecution admittedly rests, is such a departure from the accepted and usual course of judicial proceeding so as to call for the exercise of this Court's power of supervision. We suggest that under the principles laid down by this Court in *Palmer* v. *Hoffman, supra,* as well as under the construction of the controlling statute, set forth by the Fifth Circuit in *Matthews,* this Court ought to grant the petition for certiorari on this point and reverse the judgment of conviction forthwith.

8. Throughout the trial below and before the Court of Appeals, the Government prosecuted this case upon the theory that the filing of the alleged false statement with a government agency—let alone the defendant's filing of it or causing it to be filed—was not an essential ingredient of the offense. The Government maintained that the indictment did not and need not charge this fact and that it was not necessary to prove it to the jury.*

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* In the Government's brief to the Court of Appeals (p. 14), the prosecution made the following statement:

> "Appellant is charged with making a false statement in an affidavit which is within the jurisdiction of a government agency; not with personally filing or causing to be filed an affidavit which happens to contain a falsity."

Further, on page 17 of its brief, the Government states:

> "Again the gist of the alleged violation of Section 1001 is not the act of filing, but the making of a false statement."

The trial court proceeded upon the government's theory in every respect, including the charge to the jury (R. 614). The trial court expressly refused to give appellant's proposed instruction (R. 643, 646) that the jury must find that the petitioner filed or caused to be filed Government Exhibit 1. In view of the trial court's ruling, both on the indictment, the evidence and the charge, the petitioner was illegally estopped from litigating this issue and the jury was directed to determine no question of fact with respect thereto.

The lower court on review rejected the trial court's and the Government's contentions, holding (A. v-vi):

> "We do not agree with the Government's contention that because the affidavit appears regular upon its face and was found in the files of the Labor Board that that would sustain the jury's verdict, nor do we agree with its contention that the gist of the crime is the making of the false statement, if there is no proof that the affidavit had been delivered to the Board and placed on file. Until it is filed, the Board is not empowered to deal with it or to act in the light of it and it is not yet a matter which comes within its jurisdiction. *United States* v. *Valenti*, 207 F. 2d 244 (3rd Cir.), *Reass* v. *United States*, 99 F. 2d 752 (4th Cir.), *United States* v. *Borow*, 101 F. Supp. 211, D. C., N. J. * * * The mere fact that the affidavit is found in the files of an agency is not enough, for the Government still has the burden of proving that the appellant had filed or caused it to be filed with the Board."

Petitioner has no quarrel with the lower court's ruling of law that the gist of the offense is the filing of the affidavit and that the Government must prove that the defendant filed it or caused it to be filed. This represents the prevailing rule of law on the question.* Nevertheless, the Court of Appeals in reviewing the conviction below felt

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* *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3); *Todorow* v. *United States*, 173 F. 2d 439 (C. A. 9); *Terry* v. *United States*, 131 F. 2d 40 (C. A. 8); *Howard* v. *United States*, 195 F. 2d 974 (C. A. 9); *United States* v. *Gilliland*, 312 U. S. 86.

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that the record "presents circumstances which warrant a reasonable inference that the appellant signed and either filed or caused to be filed the affidavit here involved (A. vii).*

If the filing of the affidavit with the Labor Board by the defendant is an essential ingredient of the offense, in fact the gist of the offense, the most elementary principles and precedents in jurisprudence require that the indictment contain such an allegation. Concededly, the present indictment did not.†

We respectfully suggest that the normally accepted and usual course of judicial proceedings would have required summary reversal of the judgment of conviction with a direction of acquittal in light of this vital deficiency in the indictment.

The lower court in its opinion holds an indictment is sufficient if it "enable[s] the accused to know the nature and cause of the accusation" (A. ii). It is difficult to conceive how in fact petitioner had notice of the nature of the accusation when the prosecutor who framed the indictment and the trial judge held that the filing by petitioner was not an essential element of the offense. Such lack of "notice" constitutes a classical example of a deprivation of due process in a criminal proceeding. It is fatal to a conviction which cannot be resuscitated by the lower court's opinion.

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* See paragraph 7, supra. The prosecution had not contended that the hearsay testimony relating to discussions with petitioner referred to by the lower court constituted evidence that the petitioner either signed, filed or caused to be filed Government Exhibit 1. Such a contention is found for the first time in the opinion of the lower court.

† *Mookini* v. *United States*, 95 F. 2d 960 (C. A. 9) (an indictment under Section 1001 is insufficient without a charge that the claim was presented to a department); *Rolland* v. *United States*, 200 F. 2d 678 (C. A. 5), cert. den. 345 U. S. 964; See also *United States* v. *Valenti*, *supra*, and cases cited in footnote on p. 38.

The theory of the prosecution which was in fact sustained by the lower court imputes a criminal liability to a defendant in a manner repugnant to our fundamental tradition that criminal liability is essentially personal.

If the offense is the filing of the affidavit, a conviction cannot be sustained absent the charge and proof of the defendant's actions which constitute the essential element of personal culpability. See *United States* v. *Fox*, 95 U. S. 670; *Terry* v. *United States*, *supra*.

The failure of the lower court to reverse despite its own repudiation of the Government's central theory of the case in the trial court calls for exercise of this Court's power of supervision. The petition for certiorari should be granted on this point and the judgment of conviction reversed forthwith with a direction of acquittal.

9. The indictment of petitioner fails to allege either in *haec verba* or otherwise that the alleged false statements were *material statements* to a matter within the jurisdiction of a department of the United States. The lower court held that such an indictment under Section 1001 was sufficient. This is contrary to the opinions of other Courts of Appeals. *Rolland* v. *United States*, 200 F. 2d 678 (C. A. 5), cert. denied 345 U. S. 964; *United States* v. *Valenti*, 207 F. 2d 242 (C. A. 3); *Cohen* v. *United States*, 178 F. 2d 588 (C. A. 6); *Todorow* v. *United States*, 173 F. 2d 439 (C. A. 9); *United States* v. *Barra*, 149 F. 2d 489 (C. A. 2); *Sanchez* v. *United States*, 134 F. 2d 279 (C. A. 1), cert. denied 319 U. S. 768; *Terry* v. *United States*, 131 F. 2d 40 (C. A. 8); *United States* v. *Presser*, 99 F. 2d 819 (C. A. 2); *United States* v. *Mellon*, 96 F. 2d 462 (C. A. 2), cert. denied 304 U. S. 586.

These Courts of Appeals hold that the making of a material statement within the jurisdiction of a department of the United States is an essential ingredient of any offense under Section 1001. Moreover, where the matter

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has been posed other Courts of Appeals have held that since this is an essential ingredient of an offense, an indictment under Section 1001 must charge that the alleged false statement is a material statement. *Rolland* v. *United States, supra; United States* v. *Moore,* 185 F. 2d 92 (C. A. 5); *Todorow* v. *United States, supra; Harris* v. *United States,* 104 F. 2d 41 (C. A. 8); *Hills* v. *United States,* 97 F. 2d 710 (C. A. 9); *Danaher* v. *United States,* 39 F. 2d 325 (C. A. 8).

The problem presented in this conflict of the circuits is a serious and important one in the administration of federal criminal justice as well as in the interpretation of Section 1001. This requirement of materiality is not a formal or technical one but was inserted in the statute to limit its application. See *United States* v. *Moore* and *Rolland* v. *United States, supra.* It serves to mitigate the severity and limit the scope of the statute and to substitute in part at least for some of the probative limiting elements now removed from it which were contained in the earlier versions.*

By adding the requirement of materiality, Congress indicated its intent that the statute apply only to those representations which objectively would give rise to the likelihood of reliance and injury. Only those statements are deemed to be material which may seek to influence or affect governmental action.

Clearly, by the express language of the statute and the decisions relative thereto, it is only an officer of a union who may file a non-Communist affidavit. The constitutionality of the section was upheld upon the theory

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* Prior to the 1934 amendment of the predecessor of Section 1001 (Title 18, U. S. C., Section 80), the statute applied only to false statements actually resulting in pecuniary loss to the Government and only if the Government was in fact defrauded. In 1934 the section was amended eliminating pecuniary loss as an essential ingredient of the offense. See *United States* v. *Gilliland,* 312 U. S. 86; *United States* v. *Mellon,* 96 F. 2d 462 (C. A. 2), cert. denied 304 U. S. 586.

that an officer of a union would have a position of leadership and power which presumably could have an effect upon the free flow of interstate commerce. Absent this factor, an indictment is deficient. If the indictment were properly to charge materiality, it would have to allege at least that the petitioner was an officer of a trade union and further that the statement was used and filed in a matter within the jurisdiction of the National Labor Relations Board.* Absent these two considerations, the essential ingredients of the offense are lacking.†

Since the indictment of petitioner concededly does not allege materiality in *haec verba* nor does it set forth facts which would show materiality (compare *Rolland* v. *United States*, *supra*), the indictment is fatally defective and should have been dismissed.

10. The Government neither charged nor proved in the trial court that petitioner made and filed the alleged false statement with an intent to deceive or defraud the Govern-

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* Other than Government Exhibit 1 itself there was no evidence in the record that petitioner was an officer of a trade union. The lower court's reference in its opinion to petitioner's membership in a Taft-Hartley group does not satisfy the statute since the witness testifying to that matter stated that group did not come into existence until some time at the end of 1950, approximately one year after the time in issue and the purported signing of the affidavit. See summation of the Government (R. 598-599) relying solely on Government Exhibit 1 as proof of petitioner's officership.

† In *Gold* v. *United States*, App. D. C. No. 12,352 the Government in its brief on appeal sets forth the allegations it considers necessary in an indictment brought under Section 1001, Title 18, U. S. C., and Section 159(h), Title 29, U. S. C. and states:

> "The materiality of the false statements which appellant was accused of having made was charged in substance by virtue of the following allegations: that appellant was president of the International Fur and Leather Workers Union; that in a matter within the jurisdiction of the National Labor Relations Board he made, used, and filed with the Board an 'Affidavit of Non-Communist Union Officer'; that this affidavit contained false statements * * *." At p. 99.

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ment. This raises an important and serious question in the administration of federal criminal justice and in particular in the administration of Section 1001 of Title 18.

The lower court sustained a charge by the trial court to the effect that the requisite of criminal intent would be satisfied if the jury found that the petitioner "made the statement that he was not a member of the Communist Party contained in the affidavit with intent that it should be placed on file with the National Labor Relations Board for compliance with subsection h of Section 159, Title 29 of the United States Code" (R. 613-614).

Such a charge concerning intent under Section 1001 is in direct conflict with the decisions of this Court as well as the applicable decisions of other Courts of Appeals. At a minimum, the intent which must be shown in a Section 1001 proceeding is an intent to deceive or defraud the Government. *Lee* v. *United States*, 167 F. 2d 137 (C. A. 6); *Bartlett* v. *United States*, 166 F. 2d 920 (C. A. 10); *United States* v. *Tommasello*, 160 F. 2d 348 (C. A. 2); *United States* v. *Presser*, 99 F. 2d 819 (C. A. 2); *United States* v. *United States Cartridge Co.*, 95 F. Supp. 384 (D. C. Mo.), affirmed 198 F. 2d 456 (C. A. 8); *United States* v. *Buckley*, 49 F. Supp. 993 (D. C. D. C.); *United States* v. *Long*, 14 F. Supp. 29 (D. C. Mass.).*

This is in no sense merely a technical question. The importance of the requirement of a finding of intent to deceive or defraud the Goverment is underscored by the decision of this Court in *American Communications Association* v. *Douds*, 339 U. S. 382. The Chief Justice there emphasized that it is this very requirement of intent which saves this

* A recent decision of the Court of Appeals for the District of Columbia, *Fredus* v. *United States*, No. 12,058 (Feb. 24, 1955), as yet unreported, points out that the type of charge sustained by the lower court herein is clearly erroneous. The court there points out in citing the decision of the Supreme Court in *United States* v. *Murdock*, 290 U. S. 389, "willful 'when used in a criminal statute * * * generally means an act done with a bad purpose'."

statute from the vice of unconstitutional vagueness. If the statute is to be constitutionally applied to this petitioner, he was entitled at a very minimum to a proper charge of the requisite intent. In the absence of such a charge the judgment of conviction should have been reversed.*

11. During the course of the trial below a paid secret informer admitted that while acting as an agent of the Government he entered petitioner's home, rifled through his personal possessions, took notes based upon this search and turned these notes over to the Federal Bureau of Investigation. He further testified that he was paid by the Government for obtaining this information (R. 342-347). The entrance to the house of petitioner was fraudulently obtained and hence constituted a trespass, cf. *Gouled* v. *United States*, 255 U. S. 298. Petitioner immediately moved for a dismissal of the indictment or in the alternative for a hearing on the nature and scope of the illegally seized evidence and its relationship to the Government's case (R. 343-347, 407-409).

We suggest to the Court that there has rarely been so frank an admission from the witness stand in a federal criminal case of an illegal search and seizure by an individual in the pay of the Government. Under the normal principles of law underlying the Fourth Amendment to the Constitution as developed by this Court, petitioner's motion should have been granted. *Boyd* v. *United States*, 116 U. S. 616; *Weeks* v. *United States*, 232 U. S. 383; *Nardone* v. *United States*, 302 U. S. 379; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385.

Fundamental considerations of policy require a review of the failure of the lower court to repudiate this open violation of constitutional rights. As this Court has so often reiterated, "A conviction in the federal courts, the

* Absent the charge or proof that petitioner filed or caused to be filed Government Exhibit 1, the element of intent would of necessity be lacking.

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foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand." *McNabb* v. *United States*, 318 U. S. 332.

12. A paid informer confessed at the trial that while secretly acting as an agent of the Government and masquerading as a friend of petitioner after the indictment he attempted to obtain information from the petitioner concerning defense plans and preparations. He did in fact elicit such information, reported it to the Government and was paid for it (R. 372-374).

There is no more elementary principle of our system of justice guaranteed by our Constitution than the right to counsel grounded upon an inviolate privacy between attorneys and clients. The Government's conduct in this respect should not be condoned by this Court.

Standards of decency and justice require the rejection of such techniques by the prosecuting arm of the Government. We suggest that this presents a classic situation in which this Court is called upon both to safeguard the fundamental rights of individuals as well as the fabric of a democratic system of law enforcement. A criminal conviction which rests in part upon such a flagrant violation of constitutional rights cannot stand. *Powell* v. *Alabama*, 287 U. S. 45; *Johnson* v. *Zerbst*, 304 U. S. 458; *Gibbs* v. *Burke*, 337 U. S. 773; *Boyd* v. *United States*, 116 U. S. 616; *Nardone* v. *United States*, 302 U. S. 379.*

13. This prosecution, admittedly falling within the area of First Amendment principles, see *A.C.A.* v. *Douds*, rests exclusively upon the testimony of paid informers. Reliance

* The decision of the lower court in sanctioning this open interference with the right to counsel is in direct conflict with the decision of the United States Court of Appeals for the District of Columbia in *Coplon* v. *United States*, 191 F. 2d 749. The court there reversed a conviction where the record revealed interception of telephone conversations between the defendant and her counsel. The facts of this case are even more demanding.

upon such witnesses is a growing phenomenon in American trials. As this Court is aware, political prosecutions depend almost exclusively upon the existence of a system of paid informers. More and more the liberty of individual Americans is called into question upon the testimony of such individuals. Cf. *Peters* v. *Hobby*, No. 368, October Term, 1954, recently argued before this Court.

From the use of informers, who are usually protected from prosecution for any wrongdoing, inevitably flows the use of illegal means to obtain information. The informer, recognizing the vagueness and uncertainty of proof in a political trial, is ever ready to contrive the "missing evidence." * As set forth in paragraphs 11 and 12, *supra*, the paid informers here played their classic roles.

The trial court, in spite of the foundation laid therefore refused petitioner's request for the production of documents or reports of the informers. They had been caught in contradictions in their testimony. The statement of the prosecution cast doubt on the accuracy of the testimony as to the existence of the reports. Since the Government's case is based upon informer testimony, at a minimum petitioner's motion for the production of documents, vouchers and reports should have been granted. Only thus may a defendant be protected from an unfounded conviction based on the contrived evidence of an informer.

A jury must be warned that the testimony of paid informers must be received with suspicion and acted upon with caution. *Fletcher* v. *United States*, 158 F. 2d 321 (App. D. C.); *McGinniss* v. *United States*, 256 F. 621 (C. A. 2).

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* See opinion of Judge Dimock, *United States* v. *Flynn*, S. D. N. Y. No. C. 136-7, granting a new trial for two defendants therein after the exposure of the falsity of testimony by the informer Harvey Matusow.

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The court below sustained the refusal of the trial court to give such instruction to the jury.*

Petitioner was highly prejudiced by such a charge. The Trial Court should have charged in the words of *Fletcher* v. *United States, supra*, that such testimony must be looked upon "with suspicion and acted upon with caution." But the vice of this charge runs far deeper than the requirements of justice to this particular petitioner. This Court ought to review the widespread system of political prosecution based upon the testimony of paid informers and firmly establish for all inferior courts to follow certain minimal protections against the inherent unreliability of such evidence. The very fabric of American constitutional and political democracy requires such a review by this Court.

14. The lower court affirmed the trial court's denial without a hearing of petitioner's motion to dismiss the indictment on the ground that the grand jury was legally defective.

The petitioner here charged that the selection of the grand jury was the result of an unlawful and total delegation of the duty of selection to persons other than the jury commissioner, the clerk or his deputy. The duty to select jurors was unlawfully delegated to individuals not qualified in law to participate in the process. The defects complained of destroy the legal existence, the power to act,

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* The trial judge charged as follows in respect to the informer testimony:

> "The witnesses Strunk and Dunham have testified that for a period of time they received money for services and expenses from the Federal Bureau of Investigation, and you may consider that circumstance when you pass upon the weight and credit which you are going to give them as witnesses.
>
> "In considering their testimony, you should examine it with greater than ordinary scrutiny. However, if you believe the testimony, and believe it beyond a reasonable doubt, the fact that the witnesses were paid will not prevent you from giving full credit to it. But the Court calls to your attention that there was testimony of payment and that this is an element you may consider as you evaluate the testimony of the witnesses. You are the sole judges of the credibility to be given their testimony" (R. 617-618).

and nullify any steps taken by the indicting grand jury herein.

This improper method of selecting a federal grand jury is widespread throughout the country.* Only recently the federal district court for the District of Connecticut in *United States* v. *Simon Silverman, etc., et al.*, Criminal No. 8991 (February 23, 1955), dismissed an indictment upon the ground that the indicting grand jury had been illegally constituted as a result of an identical system of delegation of power by the jury officials.† The opinion of the lower court herein sanctioning such a system is thus directly in conflict with *Silverman*. This Court, in exercising its supervisory powers over the administration of federal criminal justice, ought to review this question and establish definitively for the federal courts whether such a system violates statutory and constitutional law. While this issue of unlawful delegation in the selection of jurors has not recently been before this Court, the illegality of the procedure has long been recognized. See *United States* v. *Gale*, 109 U. S. 65; *Hopt* v. *Utah*, 110 U. S. 574; *Crowley* v. *United States*, 194 U. S. 461.

It seems clear that at a minimum petitioner was entitled to a hearing on his timely motion directed against the constitution of the grand jury.‡ None of the facts in support of the motion was traversed. This Court has often held that a refusal to hear evidence offered in support of allegations that a grand or petit jury was improperly or illegally constituted is reversible error. *Carter* v. *Texas*, 177 U. S. 442; *Smith* v. *Mississippi*, 162 U. S. 592; *Tarrance* v. *Florida*,

* A similar question is now pending in the Court of Appeals for the Third Circuit in *Mesarosh et al.* v. *United States*, Nos. 11,169-11,173.

† The Government did not appeal the *Silverman* decision but proceeded to reindict the defendants therein.

‡ See *United States* v. *Gale*, *supra*; *Kohl* v. *Lehlback*, 160 U. S. 293; *Rodriguez* v. *United States*, 198 U. S. 156; *Hopt* v. *Utah*, 110 U. S. 574; *Crowley* v. *United States*, 194 U. S. 461.

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188 U. S. 519; *Morford* v. *United States*, 339 U. S. 258; *Glasser* v. *United States*, 315 U. S. 60.

There is sound public policy underlying the prohibition of unlawful delegation of power in the selection of grand juries. The danger to the administration of criminal justice which flows from an uncontrolled choice of jurors by persons having no official responsibility and not acting pursuant to statutory direction would make the grand jury susceptible to the worst forms of discrimination and abuse. The evil result is evident here in the virtual exclusion of Negroes, manual workers and trade unionists (R. 51-90). This Court ought to review this question in the interests of the integrity of the federal jury system.

15. The constitutional and statutory problems which are presented in this petition flow from the inherent vices of a statute which seeks to establish a political test oath. The statute has been upheld by a divided Court in *Douds*, *supra*. We respectfully suggest that the fundamental infirmity of the statute becomes clearer when considered within the context of a criminal proceeding. Consequently we urge that in addition to the other points we have presented, this Court consider, in the context of a criminal proceeding, anew the many profound constitutional problems presented by Section 9(h) on its face. We are cognizant of the fact that only rarely has the Court seen fit within a relatively short period of time to re-examine a prior conclusion. However, there have been circumstances where this Court has deemed such a reconsideration necessary. *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624. The many and difficult problems which are presented in a prosecution based upon political associations stem, we venture to suggest, in the first instance from an intrusion into areas clearly encompassed by the First Amendment.

16. At the conclusion of the case, petitioner submitted, with the court's leave, proposed instructions to the jury (R. 593) and requested that the court rule on each of them prior to summation (R. 594). The court refused to rule on the proposed instructions until after the Government's opening summation (R. 597). Thereupon the court granted three of the proposed instructions in form and substance, but refused to rule specifically on any of the other instructions, either in form or in substance (R. 601-602).

Prior to his summation counsel for petitioner again asked the court to rule (R. 603):

> "Now we would like to know as to those particular ones, I mean these that we have submitted, all these we have submitted, whether any of them are rejected in substance, whether any of them are rejected in substance."

The following colloquy ensued (R. 603):

> "The Court: No.
> Mr. Perlin: They are all granted in substance, but not in form. Is that correct?
> The Court: Yes.
> Mr. Perlin: Your Honor, may the record indicate that we except as to the denial as to form?"

In the midst of defense summation, counsel for petitioner referred to a proposed instructions 52 and 53 (R. 649) which he had been advised were accepted in substance. The court interrupted, reversed its ruling in the presence of the jury and stated that counsel's comment based on the aforesaid instructions was incorrect in law (R. 605). On another occasion, counsel referred to proposed instructions 26 and 28 (R. 645). The court again interrupted and indicated in the presence of the jury that petitioner's proposed instruction was incorrect (R. 604).

The risk of further contradiction by the court precluded counsel from referring to any of the propositions of law

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which he had been told had been accepted by the court and which formed the very basis for his argument (R. 627).

The court, by reversing its position in the presence of the jury, caused petitioner grave and substantial harm. The jury was led to believe that the defense summation had no basis in law or in fact and that it would be wise to disregard counsel's argument.

The denial of the right of summation in accordance with Rule 30 of the Federal Rules of Criminal Procedure strikes at such a vital right of a defendant in a criminal proceeding as to constitute a denial of a fair trial. The question here posed is not directed to the errors in the court's charge but the destruction of petitioner's right to an effective and meaningful summation.

The trial court's comments related to two essential aspects of the case, i.e. Government Exhibit 1 and whether petitioner was proven to be an officer of a trade union. One cannot minimize the effect of the actions of the trial judge upon the jury. See *Starr* v. *United States*, 153 U. S. 614.

In *Ross* v. *United States*, 180 F. 2d 160 (C. A. 6), the same lower court reversed a conviction otherwise sufficient because the trial judge committed the very acts complained of here in ruling and commenting on the special requests.*

The courts have been so concerned with protecting the right of counsel to effective summation that any deviation from Rule 30 has been held to be prejudicial on its face, requiring a reversal of a verdict of guilty.

> "Ordinarily, failure to observe the requirements of this rule will be held sufficient ground for granting a new trial, unless it affirmatively appears that no prejudice resulted therefrom; for counsel should not be re-

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* Judge Druffel, the trial judge herein, was the judge in *Ross* v. *United States*, *supra*. The lower court, in sustaining the trial judge, addressed itself not to the question raised by Rule 30 of the Federal Rules of Criminal Procedure but rather whether the content of the Court's charge was correct in law. This latter question has been dealt with elsewhere in this petition.

quired in the presence of the jury to place themselves in the attitude of apparent antagonism to the trial judge which is involved in excepting to the charge * * *. We mention it to call attention to our view that the requirements of the rule, which was adopted after most careful consideration, must be strictly observed." *Lovely* v. *United States*, 169 F. 2d 386, 391 (C. A. 4).

The action of the trial judge so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision and the granting of a new trial.

CONCLUSION

This petition for a writ of certiorari ought to be granted and the judgment of conviction reversed.

Respectfully submitted,

FRANK J. DONNER,
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New York, New York.

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Attorneys for Petitioner.

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APPENDIX

No. 12203

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EVEREST MELVIN HUPMAN, also known as MELVIN E. HUPMAN, Appellant, v. UNITED STATES OF AMERICA, Appellee.	APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided February 7, 1955.

Before SIMONS, Chief Judge, MILLER and STEWART, Circuit Judges.

SIMONS, Chief Judge. The appellant was convicted on January 15, 1954 upon an indictment filed in the United States District Court for the Southern District of Ohio, containing two counts, each charging the appellant with violating § 1001 of Title 18 U. S. C., in that he made a false, fictitious and fraudulent affidavit, as a Non-Communist Union Officer. He was sentenced separately on each count but the prison sentences were made to run concurrently. Upon his appeal, he presents nineteen separate specifications of error with some of them divided under multiple sub-heads, each claim of error being fully, and with great emphasis, argued in his brief.

We have given careful consideration to them all, realizing, as we said in *Stumbo* v. *United States*, 90 F. 2d 828, 833, that where everything is emphasized, it often results that there is no emphasis and that substantial error might be overlooked in the unnecessary massing of insubstantial complaints. The extravagant and unnecessary multiplications of exceptions and assignments of error have often been condemned, *Badders* v. *United States*, 240 U. S. 391, *Central Vermont Railway Co.* v. *White*, 238 U. S. 507. In *Gariepy* v. *United States*, 189 F. 2d 459, we noted the observation in the dissent of Mr. Justice Holmes in *United States* v. *Behrman*, 258 U. S. 280, "if this case raised a question of pleading, I should go far in agreeing to disregard technicalities that were deemed vital a hundred or even fifty years ago."

In respect to the sufficiency of an indictment, it has been repeatedly held, as in the *Behrman* case, *supra*, "it is enough to sustain an indictment that the offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and cause of the accusation and to plead the judgment, if one be rendered, in bar of further prosecution for the same offense." The indictment, in the present case, was thoroughly considered by Judge Martin of this court when sitting, by designation, in the District Court, he denied a motion to dismiss it for failure to state an offense. With his well considered views developed in his memorandum opinion of January 29, 1953, we are in full accord.

The statute under which the appellant was indicted is Title 18 U. S. C., § 1001. It is printed in the margin.[1] It

[1] "Statements or entries generally.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

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is incorporated by reference in § 159(h) of the Taft-Hartley Act, Title 29 U. S. C., which is likewise printed in the margin.[2]

The major controversy revolves about the admission into evidence of an Affidavit of Non-Communist Union Officer, purporting to be signed and sworn to by the appellant, which was found in the files of the Labor Board at Washington. That affidavit is printed in the margin.[3] It was

[2] (h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022, and 1023 of Title 18 shall be applicable in respect to such affidavits. As amended June 23, 1947, 3:17 p. m. E. D. T., c. 120, Title 1, § 101, 61 Stat. 143; Oct. 22, 1951, c. 534, § 1 (c, d), 65 Stat. 601.

[3] Government's Exhibit 1.

United States of America
National Labor Relations Board
AFFIDAVIT OF NONCOMMUNIST UNION OFFICER

(See instructions on reverse)

The undersigned, being duly sworn, deposes and says:

1. I am a responsible officer of the union named below.

2. I am not a member of the Communist Party or affiliated with such party.

3. I do not believe in, and I am not a member of nor do I support any organization that believes in or teaches the overthrow

made upon a printed form provided by the Labor Board and appears to be regular upon its face. The question, therefore, is not one of "admissibility" but whether, by itself alone, without support of the notary or identification of signature, it can support a jury verdict which, necessarily, requires a finding of fact by the jury that it was signed and sworn to by the appellant and that he either filed it or caused it to be filed with the Labor Board.

We turn, therefore, to the record which we have taken great pains to review. Virginia Bantel was the Legal Examiner for the Cincinnati office of the Labor Board. Her duties included determining the sufficiency of documents filed by labor organizations which desired to comply with §§ 9(f)(g)(h) of the National Labor Relations Act, correspondence with those organizations and maintaining records concerning their compliance with the requirements of the Act. She received the documents, determined their

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of the United States Government by force or by any illegal or unconstitutional methods.

FRIGIDAIRE LOCAL 801
UNITED ELECTRICAL, RADIO & MACHINE
WORKERS OF AMERICA (UE)
Signature: MELVIN E. HUPMAN
Address: R #6 Box 370
Dayton, Ohio

(Perforated)
REC'D
1/18/50
NLRB

Subscribed and sworn to before me this 15 day of December, 1949.

A notary public or other person authorized by law to administer oaths and take acknowledgments in and for the county of Montgomery, State of Ohio.

My commission expires Jan. 31, 1952.

GEORGE W. WHITE

GEORGE W. WHITE, Notary Public
In and For Montgomery County, Ohio
My Commission Expires Jan. 31, 1952
(Seal)

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completeness and, if all the papers had not been received, she requested those that are missing. When she determined that all of the documents received are complete, she placed the Union in compliance by letter. She then sent the documents to the Washington office of the Board for permanent filing. While she had no personal or independent recollection of the receipt of the affidavit here involved, and the affidavit itself contains no identifying marks as to how it got to her office, it was her office practice to maintain notes in her files and upon reference to such notes she testified that she received the affidavit on January 5, 1950, along with other documents at her Cincinnati office from Frigidaire Local 801 of the United Electrical Radio & Machine Workers of America, of Dayton, Ohio. On the same day, she determined that the proposed filings were not complete, so she requested Mr. Lem Markland, president of the Local Union, by letter, to submit additional documents. Compliance with this request was received on January 12, 1950. One of the requested documents was not in order, so, she again wrote to Markland and received the corrected document on January 17, 1950. On the latter date, she notified Markland by mail that the Union was in full compliance with the requirements of the National Labor Relations Act, as amended, under §§ 9(f)(g) and (h), and, on the same day, sent the documents to Washington for permanent filing. Her notes indicated that she requested the Constitution and D. L. (Department of Labor letter) on January 5. She testified further that had the documents been delivered personally, she would have asked for the missing documents orally. Her notes also indicate that the correspondence should be sent to Mr. Markland. The Cincinnati office receipt stamp was not on the original affidavit and she had nothing to do with the date that was upon the photostatic copy thereof in evidence.

Had the record shown nothing more, we should be obliged to reverse. We do not agree with the government's contention that because the affidavit appears regular upon its

face and was found in the files of the Labor Board that that would sustain the jury's verdict, nor do we agree with its contention that the gist of the crime is the making of the false statement, if there is no proof that the affidavit had been delivered to the Board and placed on file. Until it is filed, the Board is not empowered to deal with it or to act in the light of it and it is not yet a matter which comes within its jurisdiction. *United States* v. *Valenti*, 207 F. 2d 244 (3rd Cir.), *Reass* v. *United States*, 99 F. 2d 752 (4th Cir.), *United States* v. *Borow*, 101 F. Supp. 211, D. C., N. J. Moreover, in the absence of further proofs, there would have been nothing to show that the appellant signed and swore to the affidavit, filed, or caused it to be filed. The mere fact that an affidavit is found in the files of an agency of the United States is not enough, for the government still has the burden of proving that the appellant had filed or caused it to be filed with the Board.

But the fact that the affidavit was found in the files of the Labor Board, without any notation thereon indicating by whom it was filed, does not stand alone in the record. Two witnesses, Dunham and Strunk, while ostensibly members of the Communist Party, were giving information to the Federal Bureau of Investigation, with respect to Communist meetings and activities. Dunham testified as to a meeting that took place at the appellant's home in January or February of 1950, at which the appellant and his wife, Dunham and Joe Brant were present. Brant was the labor organizer for the Communist Party for the State of Ohio. There, Brant said to the appellant: "Since you signed this affidavit, the Taft-Hartley affidavit, read the Worker, the literature; don't pay any dues but contribute, support the Party and don't attend any closed meetings." The appellant replied, saying he would go along with that. Dunham and the appellant were both employees at the Frigidaire plant, in Dayton. Strunk had joined the Communist Party in 1944, became Financial Secretary of the Dayton branch, held that office from 1945

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till the latter part of 1952 and attended Executive Board Meetings. He attended a meeting at the appellant's home on December 3, 1949. The appellant and his wife and Martin Chaney were present. Chaney was State Chairman of the Communist Party in Ohio. Strunk testified that Chaney said the following at that meeting: "Five communist members would have to sign the Taft-Hartley affidavit, and the same five should not attend any meetings after he had signed it, not pay any dues; just donate every month so much money. He should meet as an individual group which would be called the Taft-Hartley group." Strunk also testified that during 1950 the Taft-Hartley group was added to three other groups already in existence; that at a registration meeting at appellant's home, in 1950, the appellant was reregistered and assigned to the Taft-Hartley group; that this group consisted of four other party members who had signed Taft-Hartley affidavits. The group included Markland, the president of the Local, with whom Miss Bantel had had her correspondence. Neither Dunham's nor Strunk's evidence was traversed nor successfully shaken by cross-examination. Circumstantial evidence from which reasonable inferences may be drawn will sustain a verdict. *American Bureau of Shipping* v. *Allied Oil Co.*, 64 F. 2d 509 (6th Cir.), *United States* v. *Stumbo*, *supra*. We think the record presents circumstances which warrant a reasonable inference that the appellant signed and either filed, or caused to be filed, the affidavit here involved. His reply to Brant, his instructions from Brant and Chaney, his membership in the Taft-Hartley group permit no other inference. The contention that appellant's reply to Brant at the 1950 meeting, if construed as an admission, was not sufficiently corroborated to establish the *corpus delicti* but was merely an uncorroborated extra-judicial statement, must be rejected. In the recent case of *Opper* v. *United States*, 348 U. S. 84, at 93, the Supreme Court, after discussing two views of the necessary quantum of corroborative evidence, came to this conclusion: "However, we think the better rule to be that

the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*." So viewed, the presence of the affidavit in the files of the Labor Board is fully explained.[4]

Equally without merit, is the appellant's complaint that the government did not prove that the appellant was a Communist on the date the affidavit was signed, or when it was filed. His argument is that even though he had been a Communist, there is no presumption that such status continued to the critical date and, even if so, the presumption must yield to the more fundamental presumption of "innocence." That may well be the rule, for the law takes cognizance of the probability, and even the possibility, of a change of allegiance or affiliation, especially if the proof of status is confined to a time remote from the date of the offense charged. Here, the evidence contains cumulative proof of membership in the Communist Party, not only up to the critical date but thereafter. The appellant's argument seems to be that unless there is direct proof that appellant was a Communist on the very day the affidavit was signed or filed, the proof of violation fails. This impresses us as an absurdity, especially when the evidence shows that the appellant's instructions were to avoid external indications of Communist membership while still maintaining connection with and giving support to the Party.

Equally lacking in persuasion is the complaint that the indictment was insufficient because of its failure to charge that the false statement was material or that the statement was made in a matter within the jurisdiction of a department of the United States. Both affidavit and indictment, in effect, proclaim materiality and jurisdiction. The appellant clearly was advised of the charge he had to meet and with specific identity to preclude the danger

[4] The mere fact that the affidavit was in the custody of the Board on January 5th unaccompanied by the necessary additional documents does not mean that it was filed on that date.

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of double jeopardy. The special attack upon the second count of the indictment, because of the failure of the Court correctly to instruct the jury as to what is meant by "affiliation," is equally without merit. Even if erroneous, it was not prejudicial because of the rule that a sentence will be sustained if it can be supported on one count of a multi-count indictment.[5]

Nor is there any virtue in the grievance that the appellant was not shown to have been an officer of the Union. The evidence shows that he was, at various times, an officer. His membership in the Taft-Hartley group indicates it and the affidavit states it. There being sufficient proof war-

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[5] COUNT ONE

That on or about December 15, 1949, in the Southern District of Ohio, Western Division, Everest Melvin Hupman, aka Melvin E. Hupman, the defendant herein, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, willfully, and knowingly in an "AFFIDAVIT OF NON-COMMUNIST UNION OFFICER" (Form NLRB-1081) make a false, fictitious and fraudulent statement and representation, to-wit, that he was not a member of the Communist Party when in truth and fact the said Everest Melvin Hupman, aka Melvin E. Hupman, then and there well knew such statement to be false, fictitious and fraudulent as he then and there well knew he was a member of the Communist Party.

COUNT TWO

That on or about December 15, 1949, in the Southern District of Ohio, Western Division, Everest Melvin Hupman, aka Melvin E. Hupman, the defendant herein, in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully, willfully, and knowingly in an "AFFIDAVIT OF NON-COMMUNIST UNION OFFICER" (Form NLRB-1081) make a false, fictitious and fraudulent statement and representation, to-wit, that he was not affiliated with the Communist Party when in truth and fact the said Everest Melvin Hupman, aka Melvin E. Hupman, then and there well knew such statement to be false, fictitious and fraudulent as he then and there well knew he was affiliated with the Communist Party.

A True Bill.

RAY J. O'DONNELL
United States Attorney

WM. R. WILSON
Foreman

ranting the jury in finding that he signed the affidavit and caused it to be filed, he can not now complain, if the jury took him at his word.

A substantial part of the appellant's brief is devoted to an attack upon the Court's instructions to the jury and the denial of many of his requests to charge. The seventy-nine special requests submitted by the appellant, many of them repetitious and nearly all of them of the most highly technical nature, would seem to suggest a technique, not without precedent, of confusing the jury and leading the Court into error in an explosive criminal trial. We have given careful consideration to the instructions of the Court to the jury. They were fair, substantially covered the crucial questions of law, with a careful analysis of the elements of the offense charged. The patience of the District Judge was severely tried by the continual interruptions, exceptions, and complaints of appellant's counsel. He remained commendably calm and impartial. The appellant was given a fair trial. We find no prejudicial error in his charge and no merit in the claims of error not herein specifically discussed.

The judgment is affirmed.

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Judgment.

(Filed February 7, 1955)

Appeal from the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

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HAROLD B. WILLE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 764

EVEREST MELVIN HUPMAN, a/k/a
MELVIN E. HUPMAN,

Petitioner,

against

THE UNITED STATES.

PETITIONER'S REPLY BRIEF

FRANK J. DONNER,
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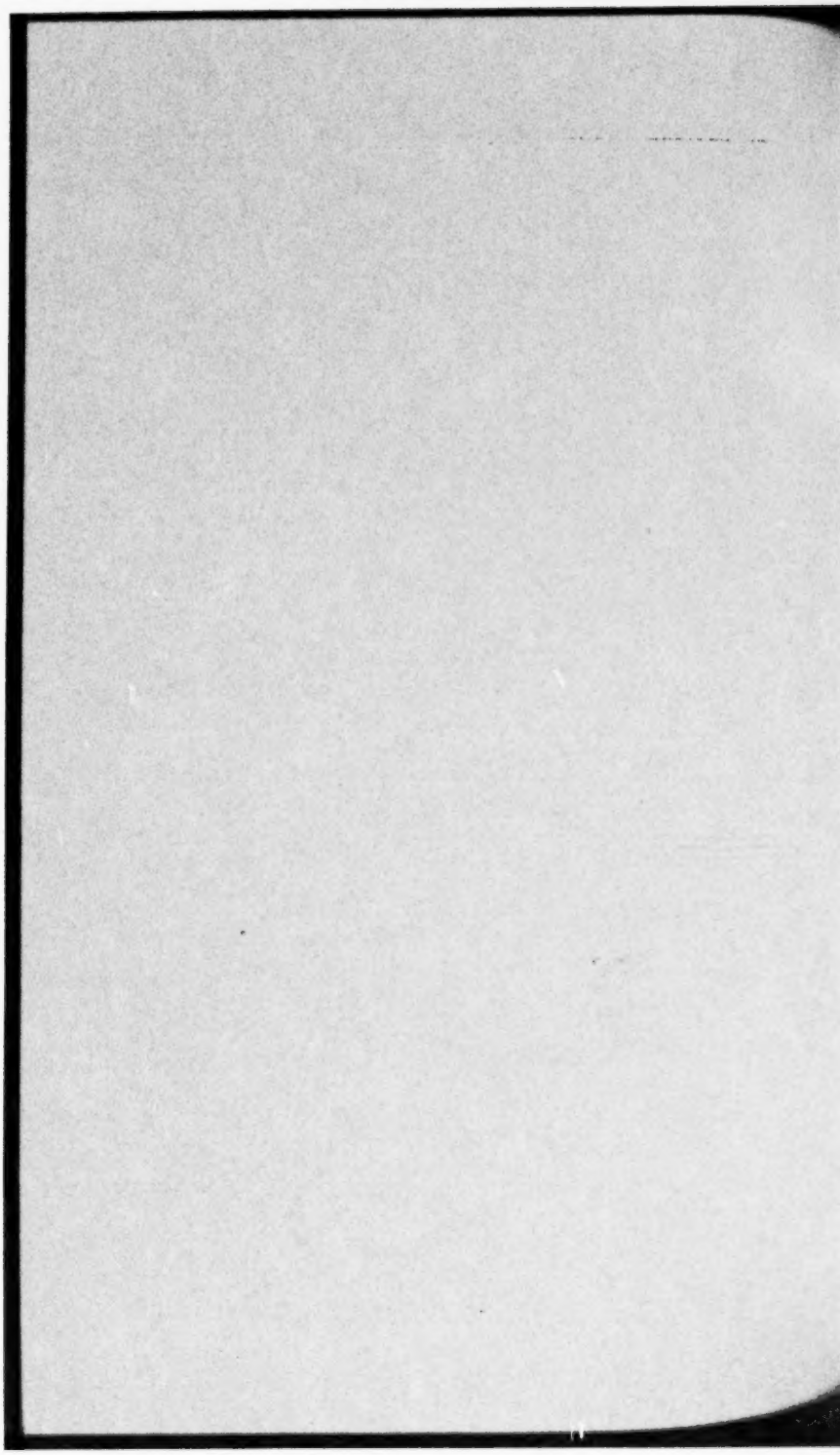

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Fifth Amendment 3

Sixth Amendment 3

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 764

EVEREST MELVIN HUPMAN, a/k/a MELVIN E. HUPMAN,

Petitioner,

against

THE UNITED STATES.

PETITIONER'S REPLY BRIEF

The present petition raises questions of novel impression, involving for the first time the application of Section 9(h) of the Labor-Management Relations Act of 1947. This is not seriously contested by the government in its brief in opposition. Nor does it controvert the facts upon which the substantial questions raised herein relating to the administration of justice are founded. Petitioner does not intend to reargue in this reply brief the points discussed in his petition, but deems it necessary to clarify certain of the issues posed.

1. The government for the first time concedes in its brief in opposition that the filing of the affidavit by the petitioner is an essential element of the offense, stating:

> " * * * the filing of a false affidavit with the National Labor Relations Board is necessary to constitute the crime under 18 U. S. C. 1001 with which petitioner was charged * * * " (G. Br. 11-12).

If this is so, the government has confessed error as this essential ingredient of the offense is not alleged in the indictment in *haec verba* or otherwise.

The government at this late date seeks to remove itself from the horns of the dilemma by in effect rewriting the indictment, and on page 5 of its brief in opposition states:

> "Both counts charge that petitioner made false statements to a government agency, the National Labor Relations Board, in an 'Affidavit of Non-Communist Union Officer' which he filed with that agency on January 5th, 1950 * * *."

But, in fact, the indictment (R. 18-19) does not charge that petitioner (1) made a false statement to a government agency or (2) filed or caused the affidavit to be filed. Nor does the indictment refer to the purported date of filing, i.e., January 5, 1950, but rather to the purported date of signing, i.e., December 15, 1949.[1]

In light of these deficiencies, the petition for writ of certiorari should be granted and the judgment of conviction should be reversed forthwith and the indictment dismissed.[2]

2. The government does not dispute the fact that the paid informer Dunham obtained evidence against petitioner through an illegal search and seizure. Nor does it deny that Dunham while in the pay of the government sought and obtained information from petitioner relating to the

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[1] The indictment similarly failed to allege that petitioner was an officer of the union or a member thereof. The record was devoid of any evidence of petitioner's membership in the union. The prosecution relied solely upon Govt. Ex. 1 in attempting to prove officership (see Pet. 35-37).

[2] No strained and belated interpretation of the evidence may substantiate a claim that sufficient proof was offered to sustain this element of the offense. The issue was never litigated in the trial court, the government did not in fact prosecute the case on the theory that filing was an essential element of the offense, nor did the court so charge the jury.

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preparation and defense for the trial below. The prosecution does not defend these invasions upon petitioner's constitutional rights upon either moral or legal grounds. There was beyond dispute a fraud participated in by the government, perpetrated upon petitioner as a means of obtaining evidence in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution. The prosecution seeks to excuse its action on the grounds that there is no proof that the evidence so obtained was used in the course of the trial or that it served as a link in the chain of evidence in the case.

But the prosecution, with the approval of the trial court, placed a cloak of secrecy about the illegal acts and refused to disclose the fruits of the unlawful invasion of constitutional rights. Therefore one cannot now justify the conviction on the grounds that the record does not reveal the extent of the information obtained.[3]

Unfortunately, such intrusions upon the attorney-client relationship, see *Coplon* v. *United States*, 191 F. 2d 749 (App. D. C.), cert. den. 342 U. S. 926; *Caldwell* v. *United States*, 205 F. 2d 879 (App. D. C.), and instances of illegally obtained evidence through fraudulent means, see *Gouled* v. *United States*, 255 U. S. 296, are today neither rare nor unusual phenomena. The widespread use of informers and the license of any and all means to guarantee a conviction constitute such an infringement of constitutional rights and denial of due process as to require this Court to exercise its supervisory powers.

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[3] Petitioner was precluded from inquiring into the fruits of the illegal search and seizure and invasion of the attorney-client relationship. His request for production of the informer's reports to the government on his illegal search was denied (R. 343-347), as was his motion to strike the illegally-obtained evidence (R. 637). Although the proper foundation was laid, petitioner's persistent attempts to obtain notes and memoranda submitted to the government by the informers were denied (R. 572, 578, 582). Petitioner also vainly sought a hearing and examination on the nature and scope of the information obtained relating to the preparation for trial (R. 574), see *Nardone* v. *United States*, 302 U. S. 379.

3. The prosecution, in seeking to maintain the validity of the indicting grand jury herein, misconceives the import of petitioner's argument. The objection to the procedure is not solely the source of the names [4] but primarily that the federal jury officials, required by statute to constitute the list, exercised no power of selection, judgment or evaluation either prior or subsequent to the submission of names and abandoned their responsibilities in toto to persons unknown. It is not just that "there was the misfeasance of such delegation, but rather the nonfeasance of failing to perform an essential part of [the federal jury officials'] duty." *United States* v. *Silverman*, Crim. No. 8991, D. C. Conn., February 23, 1955.

The government's sole authority to sustain the action of the trial court, *Walker* v. *United States*, 93 F. 2d 383 (C. A. 8), cert. denied 303 U. S. 644, was clearly rejected by this Court in *Glasser* v. *United States*, 315 U. S. 60.[5]

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[4] The Government implies in its Brief in Opposition (G. Br. 18) that the names were obtained from "prominent citizens." In fact, as evidenced by the supporting affidavits and the offer of proof (R. 51-90), the jury officials were not acquainted with the sources of the names which composed the jury list from which the indicting grand jury was drawn.

[5] In that case the government in its brief to this Court cited *Walker* v. *United States*, *supra*, in seeking to sustain actions similar to the ones complained of herein. This Court rejected the *Walker* rationale and stated:

> "Jurors in a federal court are to have the qualifications of those in the highest court of the state and they are to be selected by the clerk of the court and a jury commissioner. * * * This duty of selection may not be delegated. United States v. Murphy, D. C., 224 Fed. 554; In re Petition for Special Grand Jury, D. C., 50 F. 2d 973."
>
> *Glasser* v. *United States*, *supra*, at p. 85.

Further, the *Walker* decision was prior to the enactment of 28 U. S. C. 1861 et seq. and the qualifications of the jurors were then determined *solely* by the law of the state in which the district was located. This has since been changed. Letters were sent out by the jury commissioner in that case calling for compliance with the minimum qualifications of jurors as provided by state law.

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4. This Court in *American Communications Association* v. *Douds*, 339 U. S. 382, sustained Section 9(h) of the Labor-Management Relations Act of 1947 upon the ground that it permitted a union officer who may have been a member of the Communist Party to shed his affiliation and thereby lawfully sign a non-Communist affidavit. It was only upon such an interpretation that the statute was sustained in the face of the charge that the political oath set forth in Section 9(h) constituted a bill of attainder. Hence, the crucial burden of the government was to prove that petitioner was a member of the Communist Party on the date he signed the affidavit, to wit, December 15, 1949. Further, this Court required direct proof of membership by overt acts at the time in issue. The prosecution in its brief in opposition seeks to gloss over the deficiencies of its evidence in these respects by avoiding them completely. Flowing from this disregard of the constitutional requirements is a certain lack of preciseness in the government's statement of the case [6] and a failure to match the proof adduced with the criteria enunciated by this Court in *American Communications Association* v. *Douds*, *supra*. These constitutional requirements will only have meaning if cases such as this, admittedly impinging on First Amendment rights, are in all their aspects severely scrutinized by this Court.

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[6] For example, the government's claim that petitioner's name was found on a Communist membership list in the year 1949 or subsequently is not supported by the record (G. Br. 9, but see R. 424, 427-428). Likewise, the government in its allusion to a "Taft-Hartley group" in 1950 (G. Br. 10) fails to reflect the record which shows that the purported group did not come into existence until the end of 1950, about a year after the date in issue (R. 448-449, 531).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of conviction reversed.

Respectfully submitted,

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MAY 27 1953

OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1952

No. 1

ALBERT E. HUTCHINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PHILIP B. PERLMAN,
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 764

EVEREST MELVIN HUPMAN, a/k/a MELVIN E. HUPMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. i-x) is reported at 219 F. 2d 243.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1955 (Pet. App. xi). A timely

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[1] For the convenience of the Court references to the Court of Appeals' opinion will include both the page reference in the appendix to the petition for certiorari and the page citation in the official report. Like petitioner, we shall use "R." to refer to the printed appendix to appellant's [petitioner's] brief in the Court of Appeals and to the proceedings in that court.

petition for rehearing was denied on March 24, 1955. On April 13, 1955, an order was signed by Mr. Justice Reed extending the time for filing a petition for a writ of certiorari to and including May 2, 1955. The petition was filed on May 2, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the validity of the non-Communist affidavit provision of Section 9(h) of the amended National Labor Relations Act, which this Court sustained in *American Communications Assn.* v. *Douds*, 339 U.S. 382, depends on the particular union officer to whom it is applied.

2. Whether, in a prosecution under the false statements statute (18 U.S.C. 1001), where the alleged false statement is contained in the non-Communist affidavit which Section 9(h) of the National Labor Relations Act requires under certain circumstances to be filed with the National Labor Relations Board, it is necessary that the indictment allege *in haec verba* that the accused filed the affidavit with the Board and that the false statement which it allegedly contained was material to a matter within the Board's jurisdiction.

3. Whether the non-Communist affidavit purportedly signed by petitioner was properly received in evidence in view of the circumstantial evidence that petitioner filed it or caused it to be filed.

4. Whether, where it is alleged and proved that false statements were made "knowingly and will-

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fully," it is necessary to allege and prove in addition that they were made with intent to deceive or defraud the Government.

5. Whether the trial court correctly instructed the jury respecting the credibility of witnesses paid by the Government while posing as members of the Communist Party.

6. Whether evidence admitted against petitioner was procured in a manner violative of his rights under the Fourth Amendment.

7. Whether petitioner was deprived of his right to counsel.

8. Whether petitioner was accorded his right to indictment by a proper and impartial grand jury.

9. Whether petitioner was denied a fair trial as a result of the action of the trial judge in ruling on his proposed instructions to the jury in the jury's presence, in alleged violation of Rule 30 of the Federal Rules of Criminal Procedure.

STATUTES INVOLVED

18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)), provides:

> No investigation shall be made by the [National Labor Relations] Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of Section 35A of the Criminal Code [now, in pertinent part, 18 U.S.C. 1001, *supra*] shall be applicable in respect to such affidavits.

STATEMENT

The petition for a writ of certiorari seeks review of the judgment of the Court of Appeals for the Sixth Circuit affirming petitioner's conviction

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on a two-count indictment (R. 18-19) charging violations of 18 U.S.C. 1001, *supra*, p. 3. Both counts charged that petitioner made false statements to a government agency, the National Labor Relations Board, in an "Affidavit of Non-Communist Union Officer" which he filed with that agency on January 5, 1950, pursuant to the provisions of Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)), *supra*, p. 4. Count 1 charged that he falsely denied being a member of the Communist Party; count 2, that he falsely denied being affiliated with the Party.

The indictment was returned on November 21, 1952, in the United States District Court for the Southern District of Ohio. Prior to the trial, which began January 6, 1954, petitioner moved to dismiss the indictment and challenged the array of jurors. These motions were denied on January 5, 1954.[2] At the completion of the Government's case petitioner moved for a judgment of acquittal and to dismiss the indictment, which motions were denied on January 14, 1954 (R. 575). Petitioner rested his case on January 15, 1954. He renewed the foregoing motions, which were again overruled (R. 606). The jury returned a verdict of guilty on both counts and petitioner was sentenced to im-

[2] These were renewals of motions made originally and denied on January 29, 1953 (R. 29), and June 19, 1953 (R. 45), before an earlier trial, which began August 30, 1953, and ended September 11, 1953, when the jury were unable to agree on a verdict.

prisonment for five years on each count, the terms to run concurrently, and to a fine of $5,000 (R. 628).

The evidence adduced by the Government may be summarized as follows:

Petitioner was an officer of Frigidaire Local 801, United Electrical, Radio and Machine Workers of America (R. 131). Virginia Bantel, as legal examiner for the Cincinnati office of the Labor Board, had the duty of determining the sufficiency of affidavits and other documents received from labor organizations seeking to comply with the requirements of the National Labor Relations Act, and she maintained records showing such compliance (R. 126-128). One of such organizations was petitioner's Union (R. 128). Among the documents received from this Union by Miss Bantel was petitioner's non-Communist affidavit (R. 127), received at the Cincinnati office of the Labor Board on January 5, 1950 (R. 128, 132). The documents being incomplete, Miss Bantel, by letter, requested the president of the Union to furnish additional documents, which were received on January 12, 1950 (R. 138, 145). Following receipt of a further corrective document on January 17, 1950, Miss Bantel notified the Union that it was in compliance with the Act (R. 129), and the documents were sent to the Labor Board office in Washington for permanent filing (R. 137). Although she had no personal recollection of the receipt of petitioner's affidavit and the affidavit contained no identifying marks as to how it reached her office, Miss Bantel, by means of notes in her files (R. 133), maintained

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as an office practice, was able to determine that petitioner's affidavit was received in her office on January 5, 1950 (R. 128, 132). It was accordingly received in evidence (R. 131).

The Government's second witness was John Mitchell, a member of the Communist Party from 1942 to February 1949 (R. 160, 189). Mitchell first became acquainted with petitioner in 1946 (R. 169) when both, card-carrying members of the Communist Party, attended a two-week school in Dayton, Ohio, sponsored by the Party (R. 170). Mitchell testified that petitioner was elected literature director of the Communist Party at Dayton in 1947 and acted in that capacity until early 1949 (R. 180-181). During 1948, Mitchell and petitioner attended executive board meetings of the Communist Party, and during June or July of that year both attended meetings of the Frigidaire Club of the Party, of which both were members (R. 183-184). In February 1949, Mitchell attended a Party meeting at petitioner's home, at which Elmer Fehlhaber, the state press director of the Communist Party, was present (R. 189). Fehlhaber made a report on the progress of the Ohio edition of the "Sunday Worker" (R. 189). Mitchell left the Party after this meeting (R. 189).

The third government witness, Roger Dunham, joined the Communist Party in 1940 to secure information for the FBI on activities of the Communist Party, for which service he received monthly pay from the FBI (R. 266-267). Dunham and petitioner, co-workers at Frigidaire, met at a

Party picnic in 1944 (R. 268-269). Dunham became press director of the Party in 1945, having charge of the distribution of "The Worker" in the Dayton area (R. 273). He testified that petitioner was the literature director for the Party in Dayton in 1947, in charge of pamphlets and books (R. 277). During 1947 and 1948, petitioner was in charge of the purchasing and distribution of such books (R. 278-279). The purchase and distribution of "The Worker" was under the direction of Dunham (R. 276, 280-281). Payments for purchases were made from a bank account in the name of "Worker's Press Club." The signatures of petitioner and Dunham were required on each check withdrawing funds from the account (R. 279). Petitioner also assisted in the distribution of "The Worker" on Sunday mornings during 1947, 1948 and the early part of 1949 (R. 281).

Dunham testified to a specific meeting held at petitioner's home in early 1949 (R. 282). This meeting was attended by Mother Bloor, a prominent Party member (R. 286, 437), who was attempting to raise funds for the defense of the eleven Communists on trial in New York for violation of the Smith Act (R. 441). Petitioner and one Strunk, another government witness, were also present (R. 286, 440). Over $200, part of which was contributed by petitioner, was collected and delivered to Mother Bloor (R. 441-442).

During January or February 1950, Dunham met one Joe Brant, labor organizer for the Communist Party in the State of Ohio, and attended a meeting at the home of petitioner (R. 292, 294). At

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this meeting Brant said to petitioner, "Since you signed this affidavit, the Taft-Hartley affidavit, read the Worker, the literature; don't pay any dues but contribute, support the Party and don't attend any closed meetings." Petitioner replied that "he would go along with that." (R. 295.)

On the same evening, Dunham further testified, petitioner attended another meeting at the home of another Party member (R. 295), at which time petitioner donated $75 to a certain fund which was being collected by the Communist Party in Cleveland, Ohio (R. 298). During September and subsequent months of 1952 petitioner attended four other meetings with other members of the Communist Party to discuss plans and activities of the Party (R. 301-303).

Another government witness, Arthur Strunk, had also joined the Communist Party at the request of the FBI, in 1944 (R. 411, 412). He became financial secretary of the Dayton branch, and held that office from 1945 until at least through 1949 (R. 414, 427, 432). His duties were to collect dues from every Party member and attend executive board meetings (R. 418). He had a list of all members of the Party in Dayton, and petitioner was on the list during these years (R. 418-419). Each year a new list of members of the Party in Dayton was prepared by the members of the executive board at what was called a "re-registration meeting." (R. 422.) Strunk testified that petitioner was elected literature director in 1947 (R. 427), and that he collected dues from petitioner in 1945 (R. 419) and 1947 (R. 428).

Strunk's testimony corroborated that of Mitchell with respect to the 1949 meeting at petitioner's home at which Fehlhaber was present (R. 189, 436) and the testimony of Dunham relating to the March 1949 meeting in petitioner's home at which Mother Bloor was present (R. 286, 437-438). On December 3, 1949, Strunk attended a meeting in petitioner's home at which petitioner, his wife, and Martin Chancey, the Ohio state chairman of the Communist Party, were present (R. 442-443). At this meeting, speaking of the forthcoming "signing" of the "Taft-Hartley affidavits", Chancey said, "five Communist Party members would have to sign the Taft-Hartley affidavit, and the same five should not attend any meetings after they had signed it, not pay any dues; just donate every month so much money. They should meet as an individual group, which would be called the Taft-Hartley group" (R. 444).

Strunk further testified that during 1950 the "Taft-Hartley group" was added to three other such groups already in existence in Dayton (R. 446-448). At a meeting at petitioner's home in 1950 (R. 453) petitioner was re-registered, taken from the "Frigidaire group," and placed in the "Taft-Hartley group" (R. 448). The "Taft-Hartley group" consisted of petitioner and four other Party members who had signed affidavits, one of whom was the president of petitioner's union (R. 456-457).

ARGUMENT

1. In *American Communications Assn.* v. *Douds*, 339 U.S. 382, this Court upheld the constitutionality

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of Section 9(h) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947 (29 U.S.C. 159(h)). See also *Osman* v. *Douds*, 339 U.S. 846. The Court held that the non-Communist affidavit provision of that section was a valid exercise of congressional power to protect commerce from the evils of disruptive, politically inspired strikes. Petitioner in effect asks the Court to reexamine its decisions in those cases (Pet. 24). In his attempt to show that Section 9(h) is unconstitutional as applied to him, petitioner quotes out of context two passages from the Court's first opinion, and argues that the validity of the section depends on the particular union officer to whom it is applied (Pet. 25). There is plainly nothing in the *Douds* opinions which warrants such a conclusion. Section 9(h) validly applies to all responsible union officers whose unions desire to utilize the services of the National Labor Relations Board.[3]

2. Petitioner contends (Pet. 37-42) that the Government failed to charge and prove (a) the filing of the affidavit and (b) the materiality of the statements contained therein.

While the filing of a false affidavit with the National Labor Relations Board is necessary to con-

[3] The fact that this was a criminal prosecution under the false statements statute (18 U.S.C. 1001) for willfully executing and filing a false §9(h) affidavit is not, contrary to petitioner's apparent contention (Pet. 23-24), a factor warranting reconsideration by this Court of its decisions sustaining the constitutionality of Section 9(h). As the Court observed in *Douds*, 339 U.S. at 412-413, the "criminal punishment specified" in Section 9(h) is that provided for by 18 U.S.C. 1001. See *United States* v. *Gilliland*, 312 U.S. 86, 93.

stitute the crime under 18 U.S.C. 1001 with which petitioner was charged (*United States* v. *Valenti*, 207 F.2d 242 (C.A. 3)), there is no requirement that the indictment allege the filing of the affidavit *in haec verba*. This indictment charged (R. 18-19) that petitioner, "in a matter within the jurisdiction of the National Labor Relations Board, * * * did unlawfully, willfully, and knowingly in an 'Affidavit of Non-Communist Union Officer' (Form NLRB-1081) make a false, fictitious and fraudulent statement and representation * * * ." This charged the essential elements of the offense in substance. An indictment or information is sufficient if it alleges the essential elements of a crime with enough particularity to apprise the defendant of the nature of the charge and to enable him to protect himself from a subsequent prosecution for the same offense. *Hagner* v. *United States*, 285 U.S. 427, 431; *Todorow* v. *United States*, 173 F.2d 439, 447 (C.A. 9), certiorari denied, 337 U.S. 925. The Government proved by the testimony of witness Bantel (*supra*, pp. 6-7) that the affidavit of petitioner was among the papers submitted by the president of petitioner's union on January 5, 1950. This, when considered together with Dunham's testimony as to the conversation between petitioner and Brant as to how petitioner should conduct himself now that he had "signed this affidavit" (*supra*, pp. 8-9) and Strunk's testimony as to petitioner's being included in the "Taft-Hartley group" of Communists (*supra*, p. 10), sufficed to prove that petitioner had filed the affidavit or

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caused it to be filed. The Court of Appeals was correct in holding that "* * * the record presents circumstances which warrant a reasonable inference that the appellant signed and either filed, or caused to be filed, the affidavit here involved" (Pet. App. vii; 219 F.2d at 247).

Similarly without merit is the contention (Pet. 40-42) that the indictment "fails to allege either in *haec verba* or otherwise that the alleged false statements were *material statements* to a matter within the jurisdiction of a department of the United States" (Pet. 40), and that it was therefore fatally defective.[4] *Rolland* v. *United States*, 200 F.2d 678 (C.A. 5), certiorari denied, 345 U.S. 964, on which petitioner relies (Pet. 40), merely states that an indictment which charges a violation of 18 U.S.C. 1001 must allege that the false statements were material or allege facts from which their materiality appears. The indictment in this case conformed to that rule. Although the word "material" was not used, the materiality of the false statements was charged in substance by virtue of the allegations (R. 18-19) that petitioner, "in a matter within the jurisdiction of the National Labor Relations Board," "did unlawfully, willfully, and knowingly, in an 'Affidavit of Non-Communist Union Officer' (Form NLRB-1081)," make "false, fictitious and fraudulent statement[s], * * * to wit, that he was not a member of the Communist

[4] Petitioner, it should be noted, does not urge that the statements in question were not in fact material, since they plainly were, but merely that they were not stated in the indictment to be material.

Party" (count 1) and that he "was not affiliated with the Communist Party" (count 2); and that these statements were known by petitioner to be false at the time he made them. These allegations showed that the false statements were material to the proper exercise of jurisdiction by the Board; hence the indictment was sufficient. *United States* v. *Cowart*, 118 F. Supp. 903 (D.D.C.).

3. Petitioner also argues (Pet. 35-37) that Government's Exhibit No. 1, his non-Communist affidavit, was improperly admitted into evidence. The contention, however, seems to be based on a misunderstanding of the opinion of the Court of Appeals.

Petitioner appears to believe that the Court of Appeals held the affidavit to have been properly admitted as being within the purview of 28 U.S.C. 1733, which provides for the admission of government records. He states (Pet. 35) that the Court of Appeals held that the affidavit had been properly admitted because "it was made upon a printed form provided by the Labor Board and appears to be regular upon its face." The Court of Appeals, however, did not adopt this theory of admissibility (see Pet. App. v-vi; 219 F.2d at 247). The court observed that there was more evidence on this point than the mere fact that the affidavit was found in the Labor Board files, namely, the testimony of government witnesses Dunham and Strunk (Pet. App. vi-vii; 219 F.2d at 247). It was on the basis of this testimony that the court concluded that the record presented circumstances which warranted the rea-

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sonable inference that petitioner had gned the affidavit and either filed it or caused io be filed (Pet. App. vii; 219 F.2d at 247). In]ding that circumstantial evidence may aid in thenthentication of a document, the court has not p forth any new legal theory. Although writingsnust generally be proved genuine before they ay be admitted in evidence, their genuineness n be established by indirect or circumstantial evi nce. *State* v. *Davis*, 203 N.C. 13, 28, 164 S.E. 737,45, certiorari denied, 287 U.S. 649; *People* v. *Mannaro*, 218 N.Y. 9, 13, 112 N.E. 436, 438. It is likewe well established that a defendant in a crimin case may be connected with the writing or mailinof a document by circumstantial as well as dire evidence. *Ford* v. *United States*, 10 F.2d 339, 35 (C.A. 9), affirmed, 273 U.S. 593; *Hartzell* v. *Uned States*, 72 F.2d 569, 578 (C.A. 8), certiorari enied, 293 U.S. 621; *Cochran* v. *United States*, 4 F.2d 193 (C.A. 8).

4. The false statements statute (18 U.S.C. 1001) provides for the punishment of anyone ho "knowingly and willfully" makes any false stement in any matter within the jurisdiction of ny department or agency of the United States. Petitioner urges (Pet. 42-44) that it is necessary hat an indictment under this statute allege, an the proof establish, not merely that a false stæment was "knowingly and willfully" made, but hat it was made "with an intent to deceive or efraud the Government" (Pet. 42-43). The contenion is without merit. "The question in any crimial prosecu-

tion involving a non-Communist affidavit must therefore be whether the affiant acted in good faith or knowingly lied * * *." *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413; cf. *Walker* v. *United States*, 192 F.2d 47, 49 (C.A. 10). "Willfully" means "deliberately and with a specific purpose to do the acts proscribed by Congress." *Hartzel* v. *United States*, 322 U.S. 680, 686. No further intent needed to be alleged or proved.

5. Petitioner contends (Pet. 45-47) that the trial court did not properly instruct the jury with respect to the credibility to be accorded the government witnesses who had posed as Communist Party members while in the employ of the FBI. The instruction requested by petitioner (R. 651) appears to have been constructed by combining two passages from the opinion of the Court of Appeals for the District of Columbia Circuit in *Fletcher* v. *United States*, 158 F.2d 321, which petitioner erroneously supposes to have laid down an invariable verbal formula for inclusion in instructions to the jury in informer cases. *Fletcher* was a narcotics case in which the sole evidence against the defendant was the testimony of a single, paid addict-informer. The court held that the jury should have been instructed that the testimony of the informer "should be examined by the jury with greater scrutiny and care than the testimony of an ordinary witness." In the instant case the Government's evidence consisted of the mutually corroborative testimony of several witnesses as well as petitioner's non-Communist affidavit itself, so that it is plainly distinguishable on its facts

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from *Fletcher*. Even so, the substance of the *Fletcher* instruction was given here when the jury were told that they should "examine it [the testimony of Strunk and Dunham] with greater than ordinary scrutiny" (R. 617). This, in the context of the cautionary instruction as a whole (R. 617-618), adequately protected petitioner's rights.

6. Also without merit is petitioner's argument (Pet. 19, 44-45) that his conviction violated the Fourth Amendment in that it rested upon evidence obtained through an illegal search and seizure. The witness Dunham testified on cross-examination (R. 342) that while he was living in petitioner's home with petitioner's consent he took notes concerning petitioner's books and personal effects. However, he said, he did not recall the substance of the notes and he did not have the notes at the time of the trial (R. 343). He did not testify as to any of the information so acquired (R. 408), and there is nothing to indicate that any such information served in any manner as a link in the chain of evidence in the case. *Gouled* v. *United States*, 255 U.S. 296, on which petitioner relies, is thus clearly distinguishable from this case. There, entry to the premises had been secured by fraud and at the trial one of the documents seized was introduced into evidence.

7. Another of petitioner's claims (Pet. 21, 45) is that his Sixth Amendment right to the assistance of counsel was violated in that witness Dunham obtained information from petitioner regarding his trial preparations and defense plans. On

cross-examination, Dunham testified (R. 372-374) that he learned from petitioner about preparations for his defense. There was, however, no invasion of the privacy of the counsel-client consultations. Cf. *Coplon* v. *United States*, 191 F. 2d 749 (C.A. D.C.), certiorari denied, 342 U.S. 926; *Caldwell* v. *United States*, 205 F. 2d 879 (C.A. D.C.). In this case all of petitioner's consultations with his counsel were private. It was petitioner himself who disclosed the plans of the defense to Dunham. And Dunham's testimony reveals that he had not been requested by the FBI to seek such information. (R. 373.) So far as appears from the record, petitioner made no further point of this matter other than to move for leave to question Dunham about it again at the conclusion of the Government's case (R. 574). We submit that there was no violation of his right to the assistance of counsel within the meaning of the Sixth Amendment.

8. Petitioner further contends (Pet. 47-49, 21-23) that his right to indictment by a proper and impartial grand jury was violated because, he says, the record reveals "a total delegation of the selection of the grand jury to persons other than the jury commissioner, the clerk or his deputy" (Pet. 21). This contention is likewise without merit. The fact that the jury commissioner and his clerk acquired the names of prospective jurors from prominent citizens did not constitute a delegation of the duty to select the jurors. The jury commissioner and clerk did not empower any one to act for them in the discharge of their responsibilities. The law

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does not contemplate that they must acquire personal knowledge of or acquaintance with prospective jurors. *Walker* v. *United States*, 93 F. 2d 383, 391 (C.A. 8), certiorari denied, 303 U.S. 644.

A lack of proportionate representation of classes of citizens on grand jury panels which is not shown to be deliberate and intentional does not violate the Constitution. *Fay* v. *New York*, 332 U.S. 261, 291; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217; *Frazier* v. *United States*, 335 U.S. 497, 504. The recent decisions of this Court which have invalidated indictments because of defects in the methods of selecting grand jurors have all involved systematic exclusion from the panel of entire classes of persons, such as women, *Ballard* v. *United States*, 329 U.S. 187; Negroes, *Cassell* v. *Texas*, 339 U.S. 282; or Americans of Mexican descent, *Hernandez* v. *Texas*, 347 U.S. 475. There was no such showing here. Cf. *United States* v. *Dennis*, 183 F. 2d 201, 216 *et seq.* (C.A. 2), certiorari denied on this point, 340 U.S. 863; *United States* v. *Flynn*, 216 F. 2d 354, 384 *et seq.* (C.A. 2), certiorari denied, 348 U.S. 909.

9. Finally, petitioner argues (Pet. 50-52) that he was denied a fair trial as a result of the action of the trial judge in ruling on his requested instructions to the jury in the jury's presence in alleged violation of Rule 30, Federal Rules of Criminal Procedure.[5] The facts are as follows:

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[5] Rule 30 provides in pertinent part: "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the

After the opening summation by the Government the trial judge called counsel to the bench and notified petitioner's counsel, in conformance with the provisions of Rule 30 (fn. 5, *supra*), that three of his requested instructions would be given in the form requested and that the remainder would be given in substance (R. 600-603). Subsequently, during petitioner's summation, when counsel started to discuss the authentication required for petitioner's non-Communist affidavit, the judge interrupted to remind him that he had ruled on the admissibility of the document and that the jury would be instructed that they could consider circumstantial evidence tending to elucidate the signing and filing of the affidavit (R. 604-605). It is this action which petitioner contends violated the procedure prescribed in Rule 30. The claim is groundless.

The judge at a federal trial is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 95; *Quercia* v. *United States*, 289 U.S. 466, 469. He may comment on the evidence and even express an opinion respecting the weight of such evidence. *Horning* v. *District of Columbia*, 254

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court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. * * *."

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U.S. 135. Here the judge merely reminded defense counsel of his ruling on the affidavit and informed him of the instruction he proposed to give to the jury (R. 604). It is difficult to see how this statement could have been prejudicial to petitioner, since the judge had ruled several days earlier that it was not necessary for the affidavit to be authenticated in the manner petitioner claimed was required (R. 130).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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